SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 391

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

JOSEPH WEISSMAN, JACOB ANSCHELOWITZ, MAURICE L. ESTOFF, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT

INDEX

1 In United States District Court

Indictment

Filed March 3, 1920

UNITED STATES OF AMERICA,
District of Connecticut:

In the District Court of the United States, in and for the district aforesaid, at the February term thereof, A. D. 1920

The grand jurors of the United States impaneled and sworn, and charged at the term aforesaid, of the court aforesaid, on their oath present that Joseph Weissman, on or about the 1st day of April, in the year of our Lord nineteen hundred and nineteen, up to and including the 21st day of November, A. D. 1919, in the said district and within the jurisdiction of said court, was engaged in business at New Haven, at No. 178 State Street, in said New Haven, as a jobber, and had a stock in trade of general merchandise. That on or about April 1st, 1919, and continuously on all days thereafter, up to and including November 21st, 1919, under the circumstances aforesaid, the said Joseph Weissman, together with divers other persons whose names are to the grand jurors unknown, then and there anticipated, contemplated, and planned that a petition in bankruptcy would thereafter be filed to have the said Joseph Weissman adjudicated a bankrupt under and pursuant to the acts of Congress relative to bankruptcy proceedings; and that thereafter in due course of said bankruptcy proceedings a trustee for the estate in bankruptcy of the said Joseph Weissman would be appointed or elected.

And the grand jurors aforesaid, on their oath aforesaid, do further present that on the 21st day of November, 1919, a petition in involuntary bankruptcy was duly filed in the District Court of the United States for the District of Connecticut to have the said Joseph Weissman, adjudicated a bankrupt; that on the 8th day of December, 1919, Joseph Weissman was duly adjudicated a bankrupt in the District Court of the United States for the District of Connecticut; that on December 30th, 1919, Melville Boyd, Raymond E. Hackett,
2 and David Strouse were duly appointed trustees in bankruptcy of the estate of the said Joseph Weissman, bankrupt; that thereafter on the 6th day of January, 1920, the said trustees duly filed their bond which had been duly approved by the said District Court for the District of Connecticut, and thereupon the said Melville Boyd, Raymond E. Hackett, and David Strouse duly qualified and became the trustees in bankruptcy of the aforementioned Joseph Weissman, bankrupt.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Joseph Weissman, Jacob Anschelowitz,

Moses Perlow, Maurice L. Estoff, Morris Jolles, Aaron B. Weissman, Harry Leider, Eli Cohen, Samuel Falck, Isador Zeitsoff, Louis Kaplan, Philip Martin, Nathan Wittkin, Isidor Gross, Samuel Geller, Jacob Goldsmith, Louis Hertzberg, Louis Lande, Leon Abrams, Israel Levinson, Barney Wilson, Louis Wolfe, Morris Lebov, Morris Renkoff, Morris Nalitsky, Louis Turner, defendants, did on or about the 1st day of April, 1919, in the city of New Haven, aforesaid, and within the jurisdiction of this court, and continuously on all days thereafter up to and including the 21st day of November, 1919, under the circumstances aforesaid, anticipating, contemplating, and planning, as aforesaid, wilfully, knowingly, unlawfully, and feloniously conspire and agree together and with each other, and with divers other persons whose names are to the grand jurors unknown, to commit an offense against the United States in and by wilfully, knowingly, unlawfully, and feloniously conspiring together and with each other, and divers other persons whose names are to the grand jurors unknown, knowingly and fraudulently to conceal, while the said Joseph Weissman should be a bankrupt as aforesaid, from the trustees in bankruptcy of the estate of the said Joseph Weissman, bankrupt, money and merchandise to the amount of one hundred thousand dollars ($100,000.00) and certain other moneys and properties of divers kinds, the amount, quality, kind, or more particular description of which are to the grand jurors unknown.

3 And in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did on or about the 6th day of November, in the year of our Lord nineteen hundred and nineteen, give and cause to be given to the said Jacob Anschelowitz, a check drawn on the Merchants National Bank, of said New Haven, in the sum of seventy-five hundred dollars ($7,500) signed "J. Weisman."

And further and in pursuance of and to effect the object of the said conspiracy the said Joseph Weissman did, on or about the 8th day of November, in the year of our Lord one thousand nine hundred and nineteen, give and cause to be given to Moses Perlow a check drawn on the Merchants National Bank of said New Haven, to the order of Moses Perlow in the sum of five thousand dollars ($5,000) signed "J. Weisman."

And further and in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weisman did on the 3rd day of November in the year of our Lord one thousand nine hundred and nineteen, cause to be shipped in care of himself at Boston, Massachusetts, certain goods, wares, and merchandise consisting of bundles, which bundles contained a large quantity of hosiery, underwear, men's shirts, and other dry goods, and which merchandise was of the value exceeding three thousand dollars ($3,000), and which merchandise so addressed was delivered by said Joseph Weisman for the aforementioned purposes of concealing the same, unto one of the defendants herein named, to wit, Maurice L. Estoff, and which mer-

chandise was duly shipped via the New York, New Haven and Hartford Railroad to Boston, Massachusetts.

And further and in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weisman did thereafter, at the city of Boston, in the State of Massachusetts, and on or about
4 the 8th day of November, in the year of our Lord one thousand nine hundred and nineteen, cause the aforementioned merchandise so shipped by him and so addressed from the city of New Haven, aforesaid, to be delivered unto one Morris Jolles, general manager of the Market Warehouse Company, Boston, Massachusetts.

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did on or about the 29th day of August, in the year of our Lord one thousand nine hundred and nineteen, cause to be given unto one Morris Renkoff a check drawn on the Mechanics Bank of New Haven, aforesaid, in the sum of seven thousand five hundred dollars ($7,500), signed, "J. Weissman."

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman, did on the 27th day of August in the year of our Lord one thousand nine hundred and nineteen, cause to be given to one Eli Cohen a check drawn on the Merchants National Bank, of said New Haven, to the order of Eli Cohen, in the sum of eighteen thousand five hundred dollars ($18,500.00), dated August 27, 1919, signed "Joseph Weissman."

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did, on the 5th day of September, in the year of our Lord one thousand nine hundred and nineteen, cause to be shipped from his place of business, No. 178 State Street, in said New Haven, to one Samuel Falck, of 126 Bleecker Street, New York City, six (6) cases, containing woolens.

And further in pursuance of and so to effect the object of the said conspiracy, the said Samuel Falck did, on or about the 12th day of September, in the year of our Lord one thousand nine hundred and nineteen, receive in his premises, at No. 126 Bleecker Street, New York City, the aforementioned six (6) cases of
5 woolens shipped from No. 178 State Street, in said New Haven, the place of business of the aforementioned Joseph Weissman, via the New England Steamship Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Harry Lieder, on or about the 4th day of September in the year of our Lord one thousand nine hundred and nineteen, did receive one (1) package containing furs, shipped unto the said Harry Lieder by the said Joseph Weissman, via the American Railway Express Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did, on or about the 14th day of July, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent by the New England Steamship

Company, from his place of business, at No. 178 State Street, in said New Haven, twelve (12) cases, containing dry goods, to one Isidor Zeitsoff, at No. — Twenty-third Street, New York City.

And further in pursuance of and so to effect the object of the said conspiracy, the said Isidor Zeitsoff, on or about the 22nd day of July in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned twelve (12) cases, containing dry goods so shipped unto the said Isidor Zeitsoff, by the said Joseph Weissman, via the New England Steamship Company.

And further in pursuance of and so to effect the object of said conspiracy, the said Joseph Weissman did, on or about the 3rd day of November, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent by the New England Steamship Company from his place of business, No. 178 State Street, in said New Haven, two (2) cases, containing dry goods, to one Louis Kaplan, doing business under the trade style of the Broadway Jobbing Company, of No. 621 Broadway, New York City.

6 And further in pursuance of and so to effect the object of the said conspiracy, the said Louis Kaplan, doing business as the Broadway Jobbing Company, on or about the 7th day of November in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned two (2) cases containing dry goods so shipped unto the said Louis Kaplan, doing business as the Broadway Jobbing Company, by the said Joseph Weissman, via the New England Steamship Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman, on or about the 6th day of October in the year of our Lord one thousand nine hundred and nineteen, did ship and cause to be sent by the New York, New Haven and Hartford Railroad Company from his place of business, at No. 178 State Street, in said New Haven, three (3) cases containing dry goods to one Philip Martin of No. 16 Mount Vernon Avenue, New York City.

And further in pursuance of and so to effect the object of the said conspiracy, the said Philip Martin on or about the 9th day of October, in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned three (3) cases so shipped unto the said Philip Martin by the said Joseph Weissman, via the New York, New Haven and Hartford Railroad Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Nathan Wittkin, then and there the manager of the business of aforementioned Joseph Weissman, at his place of business, No. 178 State Street, in said New Haven, did, on or about the 2nd day of September, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent by the New York, New Haven and Hartford Railroad Company

7 from the place of business of said Joseph Weissman, No. 178 State Street, in said New Haven, thirty-four (34) bales of

rugs to The Morgan Furniture Company, 755 Washington Street, Boston, Massachusetts, and which merchandise was thereafter received by the said Morgan Furniture Company.

And further in pursuance of and so to affect the object of the said conspiracy, the said Joseph Weissman did, on or about the 18th day of August, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent from his place of business, at No. 178 State Street, in said New Haven, one (1) case containing clothing, to one Isidor Gross, of New York City.

And further in pursuance of and so to effect the object of the said conspiracy, the said Isidor Gross, on or about the 21st day of August, in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned one (1) case containing clothing so shipped unto said Isidor Gross by the said Joseph Weissman.

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did, on or about the 5th day of August, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent from his place of business, at No. 178 State Street, in said New Haven, nineteen (19) cases and three (3) packages containing dry goods to one Samuel Geller of 163 Ferry Street, Springfield, Massachusetts, via the New York, New Haven and Hartford Railroad Company, and the American Railway Express Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Samuel Geller, on or about the 8th day of August, in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned nineteen (19) cases and three (3) packages so shipped unto said Samuel Geller by the said
8 Joseph Weissman, via the New York, New Haven & Hartford Railroad Company, and the American Railway Express Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did, on or about the 17th day of September, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent from his place of business, at No. 178 State Street, in said New Haven, four (4) cases, containing clothing, to one Jacob Goldsmith, of No. 80 Ferry Street, Springfield, Massachusetts.

And further in pursuance of and so to effect the object of the said conspiracy, the said Jacob Goldsmith, on or about the 21st day of September, in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned four (4) cases, containing clothing so shipped unto said Jacob Goldsmith by the said Joseph Weissman.

And further in pursuance of and so to effect the object of the said conspiracy, the said Jacob Goldsmith, on or about the 21st day of September in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned four (4) cases, containing

clothing so shipped unto said Jacob Goldsmith by the said Joseph Weissman.

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did, on or about the 29th day of October, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent via the New England Steamship Company from his place of business, at No. 178 State Street, in said New Haven, twenty-five cases, containing dry goods, to one Louis Hertzberg, of No. 164 East 110th Street, New York City.

And further in pursuance of and so to effect the object of the said conspiracy, the said Louis Hertzberg, on or about the 30th day of October, in the year of our Lord one thousand nine hundred
9 and nineteen, did receive the aforementioned twenty-five cases (25), containing dry goods, so shipped unto said Louis Hertzberg by the said Joseph Weissman, via the New England Steamship Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did, on or about the 14th day of October, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent from his place of business, No. 178 State Street, in said New Haven, thirteen (13) cases containing dry goods, to one Louis Lande, of 57 West Houston Street, New York City, via the New England Steamship Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Louis Lande, on or about the 16th day of October, in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned thirteen (13) cases containing dry goods, so shipped unto said Louis Lande by said Joseph Weissman via the New England Steamship Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Joseph Weissman did, on or about the 26th day of September, in the year of our Lord one thousand nine hundred and nineteen, ship and cause to be sent from his place of business, 178 State Street, in said New Haven, nineteen (19) cases containing woolens, to one Leon Abrams, trading as the Lion Textile Company, of 33 Union Square, New York City.

And further in pursuance of and so to effect the object of the said conspiracy, the said Leon Abrams, trading as the Lion Textile Company, on or about the 28th day of September, in the year of our Lord one thousand nine hundred and nineteen, did receive the aforementioned nineteen (19) cases containing woolens, so shipped unto said Leon Abrams, trading as the Lion Textile Company, by the said Joseph Weissman.

10 And further in pursuance of and so to effect the object of the said conspiracy, the said Aaron B. Weissman did, on or about the 15th day of August, in the year of our Lord one thousand nine hundred and nineteen, cause to be shipped via the New England Steamship Company one (1) case containing general dry goods,

addressed to Louis Levinson at 2338 Arthur Avenue, Bronx, New York City.

11 And further in pursuance of and so to effect the object of the said conspiracy, the said Israel Levinson, on or about the 17th day of August, in the year of our Lord one thousand nine hundred and nineteen, did receive upwards of four (4) cases containing general dry goods, so shipped unto said Israel Levinson, of 640 Broadway, New York City, by the said Joseph Weissman, via the New England Steamship Company.

And further in pursuance of and so to effect the object of the said conspiracy, the said Barney Wilson did, on or about the 17th day of November, in the year of our Lord one thousand nine hundred and nineteen and cause to be given to the said Moses Perlow a check drawn on the Mechanics National Bank, of said New Haven, to the order of Moses Perlow in the sum of three thousand dollars ($3,000.00), dated November 17th, 1919, signed "J. Weissman,"

And further in pursuance of and so to effect the object of said conspiracy, the said Louis Wolfe, did on or about the 18th day of November, in the year of our Lord one thousand nine hundred and nineteen, receive from the firm of N. Jaeckel & Son, furriers of New York City, a large quantity of ladies' fur coats and other fur garments, addressed to Joseph Weissman, New Haven, Conn., and caused the same to be taken from the premises of H. Jaeckel & Son, in an automobile owned, operated, and controlled by the said Louis Wolfe.

And further in pursuance of and so to effect the object of the said conspiracy, the said Morris Lebov did cause to be delivered unto Joseph Weissman, three (3) promissory notes made by said Morris Lebov to the order of Joseph Weissman, each note dated November 11th, 1919, payable, respectively, in four (4), eight (8), and twelve (12) months thereafter, each note in the sum of one thousand dollars ($1,000.00) as the alleged consideration for the purchase of all the right, title, and interest of Joseph Weiss-

12 man in and to a place known as Ritter's Restaurant on 116th Street, near Lenox Avenue, New York City.

And further in pursuance of and so to effect the object of the said conspiracy the said Joseph Wiessman, thereafter and after the 21st day of November, A. D. 1919, did deliver the aforementioned three (3) promissory notes so received by him from said Morris Lebov unto David Strause as receiver in bankruptcy of the estate of Joseph Wiessman.

And further in pursuance of and so to effect the object of the said conspiracy, the said Maurice L. Estoff, did, at various and divers times throughout the months of August, September, October, and November, in the year of our Lord one thousand nine hundred and nineteen, cause to be delivered in a certain motor truck owned and controlled, by the said Maurice L. Estoff, a large quantity of goods, wares, and merchandise, the property of the said Joseph

Weissman, from the premises No. 178 State Street, in said New Haven, unto Eli Cohen at Springfield, Massachusetts; Philip Martin, Mount Vernon, New York; Leon Abrams, trading as the Lion Textile Company, 33 Union Square, New York; and divers other persons, whose names are to the grand jurors unknown and did cause all records of the shipments and delivery of said merchandise from the premises of the aforesaidmentioned Joseph Weissman, unto the aforementioned persons, and other persons whose names are to the grand jurors unknown, to be destroyed.

And further in pursuance of and so to effect the object of the said conspiracy, the said Morris Nalitsky did on or about the 17th day of September, A. D. 1919, together with the aforesaid mentioned Maurice L. Estoff, sell and dispose of a certain large quantity of lumber consigned unto the said Joseph Weissman at said
13 New Haven, from one B. Malkin, of Holyoke, Massachusetts, by causing the said lumber aforementioned to be delivered by the aforementioned Maurice L. Estoff to the Columbia Lumber Company of said New Haven.

And further, in pursuance of and so to effect the object of the said conspiracy, the said Louis Turner did, on or about the 1st day of November, A. D. 1919, at No. 622 Broadway, New York City, receive from the aforementioned Joseph Weissman certain raincoats, which raincoats had been caused to be delivered by Joseph Weissman and did cause said raincoats to be concealed, amount of which raincoats exceed six thousand dollars ($6,000.00) in value.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

(Violation of 29b, bankruptcy act, and Penal Code 37.)

GEORGE H. COHEN,
Special Asst. to U. S. Attorney.

14 ADDITIONAL COUNTS OF INDICTMENT

(General form)

Second count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Joseph Weisman at all the times hereinafter mentioned was engaged in the business of jobbing and general dry goods at New Haven, in the State of Connecticut in the district aforesaid, and within the jurisdiction of this court, to wit, at No. 178 State Street, in said New Haven; that on or about the 1st day of April, A. D. 1919, the said Joseph Weissman, together with Jacob Anschelowitz, Moses Perlow, Maurice L. Estoff, Morris Jolles, Aaron B. Weissman, Harry Lieder, Eli Cohen, Samuel Falck, Isidor Zeitsoff, Louis Kaplan, Philip Martin, Nathan Wittkin, Isidor Gross, Samuel Geller, Jacon Goldsmith, Louis Hertzberg, Louis Lande, Leon Abrams, Israel Levinson, Barney Wilson, Louis Wolfe, Mor-

ris Lebov, Morris Renkoff, Morris Nalitsky, Louis Turner, and divers other persons whose names are to the grand jurors unknown, in the district aforesaid, then and there contemplated, anticipated, and planned that the said Joseph Weissman, doing business as aforesaid should commit an act of bankruptcy; that is to say, should purchase large quantities of merchandise to be used in his business as aforesaid, to receive the said merchandise and then remove it from the premises where he was then and there conducting business as aforesaid, to conceal the said merchandise which was part of the property of the said Joseph Weissman, the said property consisting of a large quantity of hosiery, underwear, serges, woolens, silks, furs, diamonds, lumber, and other property, a more exact description of the said merchandise being to the grand jurors unknown, with intent to defraud his creditors, and that an involuntary petition in bankruptcy should thereafter be filed in the United States District Court for the District of Connecticut against the said Joseph Weissman, doing business as aforesaid, by the creditors of the said Joseph Weissman, and that thereafter the said Joseph Weissman, doing business as aforesaid, should be adjudicated a bankrupt under the acts of Congress relating to bankruptcy, and that thereafter a trustee or *trustee or* trustees should be appointed in the bankruptcy proceedings of the estate in bankruptcy of the said Joseph Weissman.

That on November 21st, A. D. 1919, an involuntary petition in bankruptcy was duly filed against the said Joseph Weissman in the United States District Court for the District of Connecticut, and that thereafter and on the 8th day of December, A. D. 1919, the said Joseph Weissman was duly adjudicated a bankrupt.

That on December 30th, A. D. 1919, Melville Boyd, Raymond Hackett, and David Strouse were duly appointed trustee in bankruptcy of the said Joseph Weissman, the aforesaid bankrupt, and thereafter their bonds as such trustees and the orders approving the same were duly on file in the office of the clerk of the said district court, and thereupon said Melville Boyd, Raymond E. Hackett, and David Strouse duly qualified and became the trustees in bankruptcy of the aforesaid bankrupt; and at the time the said Joseph Weissman was adjudicated a bankrupt, he had a large number of creditors exceeding three hundred (300) in number, having provable claims against him in bankruptcy, the amount of whose claims exceed one million dollars ($1,000,000.00) in amount, and there were not then or thereafter sufficient assets or property belonging to the said estate in bankruptcy of said bankrupt to satisfy the claims of the said creditors in full.

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Joseph Weissman, while a bankrupt as aforesaid, under the circumstances aforesaid, did, on or about the 15th day of January, A. D. 1920, and thereafter, within the district aforesaid, and within the jurisdiction of this court, knowingly and fraudulently conceal from Melville Boyd,

Raymond Hackett, and David Strouse, being then and there duly qualified trustees in bankruptcy of the said Joseph Weissman, property belonging to the estate of the said Joseph Weissman, the bankrupt aforesaid, the said property consisting of a large quantity of merchandise, consisting of underwear, diamonds, raincoats, furs, shirts, and moneys in a sum upwards of one hundred thousand dollars ($100,000.00), a more exact description of the said merchandise being to the grand jurors unknown.

And the grand jurors aforesaid, on their oath aforesaid, do further present that on or about the aforementioned 15th day of January, A. D. 1920, the said Jacon Anschelowitz, Moses Perlow, Maurice L. Estoff, Morris Jolles, Aaron B. Weissman, Harry Lieder, Eli Cohen, Samuel Falck, Isaac Zeitscoff, Louis Kaplan, Philip Martin, Nathan Wittkin, Isidor Gross, Samuel Geller, Jacon Goldsmith, Louis Hertzberg, Louis Lande, Leon Abrams, Israel Levinson, Barney Wilson, Louis Wolfe, Morris Lebov, Morris Resnikoff, Morris Nalitsky, Louis Turner, and divers other persons whose names are to the grand jurors unknown, in the district aforesaid, under the circumstances aforesaid, did knowingly and fraudulently cause, procure, aid, and abet the said Joseph Weissman, while the said Joseph Weissman was a bankrupt as aforesaid, knowingly and fraudulently to conceal in the manner and form aforesaid, from Melville Boyd, Raymond E. Hackett, and David Strouse, the duly qualifoed trustees in bankruptcy of the said Joseph Weissman, the aforesaid property belonging to the estate in bankruptcy of the said Joseph Weissman.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

(Violation of 29B, bankruptcy act, and Penal Code 332.)

GEORGE H. COHEN,
Special Assistant to U. S. Atty.

A true copy.
Attest: C. E. PICKETT, *Clerk.*
[File endorsement omitted.]

17 In United States District Court for the District of Connecticut

In the matter of United States vs. Joseph Weissman, Morris Nalitsky, Isador Zeitsoff, Isador Gross, Aaron B. Weissman, Jacob Anschelowitz, Louis Wolfe, Morris Renkoff

Defendants' plea in abatement and motion to quash and dismiss the indictment

Filed March 29, 1920

(In accordance with the order heretofore made by the court, the above defendants hereby withdraw the plea of not guilty heretofore

entered, and in place and stead thereof submit the following plea in abatement, motion to quash, and by a separate document, a demurrer to said indictment.)

1. That during the hearing before the grand jury, while it was deliberating and considering the indictment, and before the same was ultimately found against these defendants, there appeared as a witness one Archibald Palmer, Esq., an attorney at law, of New York, who was then and for a long time prior thereto had been the attorney for creditors of the defendant, Joseph Weissman, and the attorney for David Strouse, receiver of the bankrupt estate of said Joseph Weissman, and the attorney for Melville Boyd, Raymond E. Hackett, and David Strouse, as the trustees of the bankrupt estate of the defendant Joseph Weissman, and said Archibald Palmer, Esq., as such attorney aforesaid, appeared in the capacity of a witness before said grand jury and testified concerning the alleged charges in the bill of indictment, and in support thereof the said Archibald Palmer, the defendants are informed and believe, introduced and exhibited before said grand jury the contents of
18 documents, memoranda, and data as to matters concerning which he, the said Archibald Palmer, Esq., was not a party, and of which he had only hearsay knowledge; and the said Archibald Palmer, Esq., while before said grand jury as such witness, imparted to said grand jury information that he, the said Archibald Palmer, Esq., as attorney for the receiver and trustees aforesaid, procured from examinations of the defendant, Joseph Weissman, while a witness in his bankruptcy proceedings, and the said Archibald Palmer, Esq., by means of said information, induced the said grand jury to find said true bill, and said Archibald Palmer, Esq., was mainly instrumental in inducing said grand jury to find said true bill against these defendants, and returned said true bill against them and each of them.

2. Upon information and belief that at the sitting of said grand jury, and while it was considering the complaint recited in the indictment, and while it was hearing testimony concerning the same, there was present in said grand jury room and within the hearing of what transpired, and listening to what was said, with the consent of the district attorney, a person who was not an attorney, or representative of the Government, nor a witness in said cause at said time, nor was such person authorized by law to be in said grand jury room at said time.

3. That at the said sitting of said grand jury, and while the said grand jury was engaged in its official business in the manner set forth in the indictment against said defendants, and while said grand jury was deliberating on said cause, the said Archibald Palmer, Esq., while not attending as a witness, was present in said grand jury room.

19 4. That the indictment herein has no legal foundation to support it, and that the same is wholly or largely founded

upon illegal and incompetent evidence given before said grand jury, and upon evidence the admission of which before said grand jury was prohibited by law, and said indictment is without any legal evidence warranting the finding thereof against these defendants, and said grand jury, in finding said indictment, was governed and controlled wholly or in part by such alleged illegal, unlawful, and prohibited evidence, contents or memoranda and data not legally admissible as evidence before said grand jury, and said indictment is founded upon illegal, improper, and incompetent evidence.

For the reasons aforesaid, the defendants respectfully pray judgment dismissing said indictment, and further move that the indictment herein be quashed, set aside, and dismissed.

Defendants:

JOSEPH WEISSMAN.
MORRIS NALITSKY.
ISADOR ZEITSOFF.
ISADOR GROSS,
AARON B. WEISSMAN.
JACOB ANSCHELOWITZ.
LOUIS WOLFE.
MORRIS RENKOFF.
By BENJAMIN SLADE,
Their Attorney.

[Jurat showing the foregoing was duly sworn to by Benjamin Slade omitted in printing.]

[File indorsement omitted.]

20 In United States District Court

[Title omitted.]

Demurrer to indictment

Filed March 29, 1920

The defendants Joseph Weissman, Morris Nalitsky, Isador Zeitsoff, Isador Gross, Aaron B. Weissman, Jacob Anschelowitz, Louis Wolfe, and Morris Renkoff demur to the indictment filed in the above-entitled cause on the 9th day of March, 1920, and for reasons of demurrer assign the following:

1. Said indictment is insufficient in law.
2. The facts set forth therein do not constitute a crime.
3. The alleged facts set forth in said indictment do not constitute any offense against the Constitution of the United States or the laws thereof.

4. Said indictment fails to plead indispensable facts, but does plead conclusions of the pleader.

Defendants:

JOSEPH WEISSMAN.
MORRIS NALITSKY.
ISADOR ZEITSOFF.
ISADOR GROSS,
AARON B. WEISSMAN.
JACOB ANSCHELOWITZ.
LOUIS WOLFE.
MORRIS RENKOFF.
By BENJAMIN SLADE,
Their Attorney.

[File endorsement omitted.]

Demurrer overruled Sept. 9, 1921.

THOMAS, D. J.

21 In United States District Court

[Title omitted.]

Demurrer to plea in abatement

Filed November 27, 1920

The United States demurs to the plea in abatement and motion to quash the indictment filed in the above-entitled cause on the ——— day of April, 1920, and for reasons of demurrer assigns the following:

1. That the plea in abatement and motion to quash are insufficient in law;

2. That the facts set forth therein do not constitute a plea in abatement;

3. That the plea in abatement fails to show the source of the information upon which it is predicated;

4. That said plea in abatement and motion to quash fail to show there was no legal evidence to support the indictment;

5. That the plea in abatement fails to show the defendants were prejudiced by alleged irregularities in the procedure of the grand jury leading to the indictment;

6. That the defendants having demurred to the indictment simultaneously with the interposing of the plea in abatement and motion

to quash have thereby vitiated the plea in abatement by ad-
22 mitting the regularity of the indictment and the facts set forth therein.

UNITED STATES,
By EDWARD L. SMITH,
United States Attorney.

[File endorsement omitted.]

Demurrer sustained September 9, 1921.

THOMAS, *D. J.*

[File endorsement omitted.]

23 [Title omitted.]

The defendant Joseph Weissman, being one of the defendants in the above-entitled cause, hereby withdraws the demurrer filed by him heretofore, and dated the 29th day of March, 1920, intending hereby to restrict the withdrawal of said demurrer only as said defendant Joseph Weissman is concerned.

Dated at New Haven this 29th day of November, 1920.

Defendant:

JOSEPH WEISSMAN,
By SLADE, SLADE & SLADE,
His Attorneys.

[File endorsement omitted.]

24 In the United States District Court

[Title omitted.]

Defendants' motion to quash and dismiss the indictment

Filed March 2, 1922

The above-named defendants hereby move that the indictment in said cause as against them be quashed and dismissed, because

1. Said indictment is insufficient in law.

2. It fails to set forth sufficient facts to constitute any offence under the Constitution of the United States, or any laws thereof.

3. Said indictment fails to set forth facts which are in law sufficient warranting the charge against these defendants that a conspiracy was entered into or existed:

A. For the purpose of committing any offence against the United States, or

B. To defraud the United States in any manner, and

C. That any of the alleged overt acts recited in the indictment are such overt acts as tend to affect the object of the alleged conspiracy.

MAURICE L. ESTOFF.
JOSEPH WEISSMAN.
MORRIS NALETSKY.
AARON B. WEISSMAN.
JACOB ANSCHELOVITZ.
LOUIS WOLF.
MORRIS RENCOFF.
By BENJ. SLADE & C. J. MARTIN,
Their Attorneys.

[File endorsement omitted.]

25 In the United States District Court

[Title omitted.]

Motion to withdraw motion to quash and dismiss the indictment

Filed March 31, 1922

The above-named defendants hereby withdraw from the records of this court their motion heretofore filed by them to quash and dismiss the indictment, and said defendants now appear in court and are ready, willing, and anxious to proceed with the trial of said cause before the jury heretofore impaneled in said cause, and now serving as such jury.

JOSEPH WEISSMAN.
MORRIS NALETSKY.
AARON B. WEISSMAN.
JACOB ANCHELOVITZ.
LOUIS WOLF.
MORRIS RENCOFF.
By CHARLES J. MARTIN,
BENJAMIN SLADE,
Their Attorneys.

Ordered accordingly.

_____,
United States District Judge.

[File endorsement omitted.]

26 In United States District Court

[Title omitted.]

Plaintiff's motion in opposition to defendants' motion to withdraw motion to quash and to dismiss the indictment heretofore filed by the said defendants

Filed April 3, 1922

The plaintiff in the above-entitled action hereby respectfully prays this court that the above-named defendants be refused leave to withdraw the motion to quash and to dismiss the indictment heretofore filed by them in this action and further respectfully prays this court that it render a decision on the said motions for the following reasons:

1. If the question involved is one of jurisdiction, once it has
27 been raised it is of such importance that it should be ruled upon as the entire case depends upon it.

2. The validity of all subsequent proceedings depends upon the decision of the question as to whether or not the court has jurisdiction of the entire matter.

3. If the indictment is insufficient or does not confer jurisdiction upon this court, all proceedings upon the same are and will be invalid.

4. The court has already stated, while in session, that the questions raised by the motion of the defendants are of such importance as to warrant their being answered by the Supreme Court of the United States.

5. The court has already stated, while in session, that it has doubts as to its jurisdiction in this matter.

6. The court has already stated, while in session, that it has doubts as to the sufficiency of the indictment as far as charging a crime or crimes against the laws of the United States is concerned.

7. Since the court has already expressed, while in session, a doubt as to whether or not a crime is sufficiently alleged by the indictment, the court will be met with the same doubt when it becomes necessary to rule on questions of the admissibility of evidence brought forward by the Government in support of the said indictment.

8. The court is in doubt on these matters after a careful study of numerous cases on both sides, and since this is the case, the
28 court should not permit the defendants to withdraw their motion after they have succeeded in raising such a great doubt in its mind, but should determine the question finally by a ruling on the same.

9. In view of the doubt in the mind of the court, it does not appear desirable to cause either the plaintiff or the defendants the expenditure of much time and money by forcing them to proceed with this action without a definite ruling on the same.

Wherefore the plaintiff respectfully prays this court to deny the defendants leave to withdraw the above mentioned motions and further prays this court that it should render a decision upon their motions as originally filed.

Respectfully,

EDWARD L. SMITH,
United States Attorney.
GEORGE H. COHEN,
Assistant U. S. Attorney.

[File endorsement omitted.]

29 In United States District Court

[Title omitted.]

Memorandum of decision on objections filed by the Government to defendants' withdrawal of motion to quash and dismiss the indictment

Filed April 26, 1922

On March 1, 1922, after a jury had been empanelled and sworn, and the trial was about to commence, the defendants filed, in writing, a motion to quash and dismiss the indictment. Exhaustice arguments were made by counsel for each side and lengthy briefs were filed. After careful consideration of the claims of law raised the court suggested the propriety and advisability of getting from the Supreme Court its decision on the questions of law presented before further proceeding with the trial, and in this suggestion counsel for the Government acquiesced. For the purpose, therefore, of submitting such questions of law as were presented by the motion to the Supreme Court, decision by this court on defendants' motion to quash and dismiss was deferred. Subsequently and on March 31, 1922, and before any decision had been made by the court on the motion to quash, the defendants filed with the clerk of this court a written withdrawal of their motion to quash and dismiss. The Government now files a motion—

"in opposition to defendants' motion to withdraw motion to quash and to dismiss the indictment heretofore filed by the said defendants,"

and counsel strenuously argue against allowing the defendants to withdraw their motion.

30 It seems apparent that a misconception exists on the part of counsel for the Government as the defendants' pleading is not a "motion to withdraw," but an outright withdrawal. It therefore follows that the motion to quash and dismiss the indictment is not now pending before the court for decision, but has been withdrawn. As already pointed out, the record shows that the motion to quash and dismiss was actually withdrawn on March 31, 1922, and before any decision was made by the court. Thus there

is nothing now before the court to decide. The defendants, as they had a right to do, filed a withdrawal. They did not file a motion for permission to withdraw their motion to quash and dismiss. They had the right to file their withdrawal without either an order or the permission of the court.

I do not understand that a court possesses any power to prevent a party filing a motion to quash, to withdraw the same at any time before the motion is judicially determined.

While I am still of the opinion on the important questions of law raised by the motion to dismiss that the status of the law is unsatisfactory, and while I still believe that in the interest of justice it would have been, as I said in open court on March 13th, 1922, most advantageous to get a decision from our highest tribunal on those questions, nevertheless, both sides and the court agree that the same can not be accomplished because of lack of warrant in the law to enable this court to certify the questions raised for the determination by the Supreme Court unless and until there is a final judgment.

However much I regret that the questions of law raised on the motion to quash and dismiss can not now be directly certified
31 and submitted for decision to the Supreme Court in advance of the trial, the court is nevertheless powerless to prevent the trial from proceeding in view of the withdrawal by the defendants' counsel of their own motion to quash and dismiss.

After a studied consideration of all the facts and a research of the authorities upon the objections filed by the Government, I conclude:

1. That it is the privilege of the defendants to withdraw any plea made or motion filed before the judicial determination of either plea or motion.

2. That there is no rule of court and no statute preventing the withdrawal by the party filing it of such a motion as was made in this case without order or permission of court.

3. That upon the withdrawal by the defendants of their motion to quash the indictment there is nothing before the court for decision, and that therefore the trial must proceed.

4. That the jury, having been temporarily excused, is legally existing, and in the absence of any motion to quash, or any other motion, the case stands on the defendants' plea of not guilty and the trial must proceed.

5. The clerk will therefore notify counsel on both sides forthwith of this ruling, that the trial will be resumed on Monday, May 8, 1922, at 10.30 a. m., at New Haven, and summon the jury to appear at said time and place, and it is so ordered.

April 26, 1922.

[File endorsement omitted.]

32 In United States District Court

[Title omitted.]

Certificate of reasons for finding indictment defective and directing a verdict of not guilty by a jury

Filed May 25, 1922

Upon application of George H. Cohen, Esq., assistant United States attorney for the District of Connecticut, praying this court that it set out the reasons causing it to declare the indictment in this case defective and directing the jury to return a verdict of not guilty thereon, this court hereby certifies it was caused to take this action on the several counts for the following reasons:

First count

The court construed section 37 of the Criminal Code in connection with 29 B of the bankruptcy act as not covering a conspiracy to have a bankrupt conceal his assets from his trustee in bankruptcy where the conspiracy was formed and all overt acts in pursuance of it were done prior to the adjudication of the bankruptcy.

Second count

The court construed section 332 of the Criminal Code as not covering an aiding and abetting of a bankrupt to conceal his assets from his trustee, where all the acts of aiding and abetting were done before bankruptcy, and also because there can be no offense of aiding and abetting a person, who, like a bankrupt, can alone commit the principal offense.

Dated at Hartford, Connecticut, this 24th day of May, A. D. 1922.

EDWIN S. THOMAS, *D. J.*

[File endorsement omitted.]

33 In United States District Court

Bill of exceptions

Filed June 6, 1922

Be it remembered that on the trial of this cause in this court at the February term, A. D. 1922, of said court the Honorable Edwin S. Thomas, judge, presiding, the following proceedings were had, to wit, a jury was impaneled and sworn according to law.

1. Thereupon counsel for the defendants filed a motion to dismiss the indictment, counsel for the Government objected to the court's permitting the defendants to file such motion since the court had previously sustained the plaintiff's demurrer and the plea in abatement and demurrer of the defendants.

The court overruled said objection, stating that the motion to dismiss raised a question of jurisdiction, which could be raised at

any time, to which ruling of the court counsel for the plaintiff then and there excepted.

2. After the jury had been so impaneled the court of its own motion dismissed the indictment on the ground that it was defective.

To this action of the court counsel for the Government objected; its objections were overruled by the court; thereupon counsel for the plaintiff then and there excepted to said ruling.

34 3. After the court had dismissed the indictment on the ground that it was defective, the court of its own motion directed the jury to return a verdict of not guilty.

Counsel for the plaintiff objected to the direction of a verdict of not guilty on the ground that no evidence whatever had been introduced by the plaintiff in this case and that therefore the jury had no evidence before it, and further on the ground that no verdict could be had on a defective indictment.

The court overruled said objection, and counsel for the plaintiff then and there excepted.

4. After the court had so directed the jury to return a verdict of not guilty, the jury retired, and after conferring, returned and, through its foreman, offered to present its verdict of not guilty.

Thereupon counsel for the Government objected to the reception of a verdict of not guilty from the jury on the grounds stated in paragraph 3.

The court overruled said objection and received the verdict of not guilty from the jury. To this ruling of the court counsel for the plaintiff then and there excepted.

And now, in furtherance of justice and that right may be done, the plaintiff, the United States of America, tenders and presents the foregoing as its bill of exceptions in this case to the action
35 of the court and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this sixth day of June, A. D. 1922.

EDWIN S. THOMAS,
Trial Judge.

[File endorsement omitted.]

36 In United States District Court

[Title omitted.]

Petition for writ of error

Filed June 6, 1922

And now comes the United States of America, plaintiff herein, and says:

That on or about the 8th day of May, 1922, the District Court entered a judgment herein in favor of the defendants and against

this plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

EDWARD L. SMITH,
United States Attorney.
GEORGE H. COHEN,
Assistant U. S. Attorney,
Attorneys for Plaintiff in Error.
ARCHIBALD PALMER,
Sp. Asst. U. S. Atty., of Counsel.

[File endorsement omitted.]

37 In United States District Court

Writ of error

Filed June 6, 1922

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judge of the District Court of the United States for the District of Connecticut, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between the United States of America, plaintiff, and Joseph Weissman, Jacob Anschelowitz, Maurice L. Estoff, Aaron B. Weissman, Eli Cohen, Samuel Falck, Louis Kaplan, Nathan Wittkin, Louis Hertzberg, Barney Wilson, Louis Wolfe, Morris Lebov, Morris Renkoff, Morris Nalitsky, and Louis Turner, defendants, a manifest error has happened, to the great damage of the said United States of America as by its complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 6th day of July, 1922, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

38 Witness the Honorable William H. Taft, Chief Justice of the United States, the 6th day of June, in the year of our Lord one thousand nine hundred and twenty-two, and of the independence of the United States of America the one hundred and forty-sixth.

[SEAL.] C. E. PICKETT,
Clerk of the District Court of the United States for the District of Connecticut.

The foregoing writ is hereby allowed.

EDWIN S. THOMAS,
United States District Judge.

[File endorsement omitted.]

39 In United States District Court

[Title omitted.]

Assignment of errors

Filed June 6, 1922

The United States of America, plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers exist:

1. The court erred in finding the indictment defective on the grounds stated in its certificate of reasons for finding indictment defective and directing verdict of not guilty by the jury.

2. The court erred in directing the jury to return a verdict of not guilty for the defendants without the introduction of any evidence on the part of the plaintiff.

3. The court erred in receiving a verdict of not guilty from the jury without the introduction of any evidence on the part of the plaintiff.

4. The court erred in directing the jury to return a verdict of not guilty for the defendants upon an indictment which it had declared defective.

5. The court erred in overruling the objection of the plain-
40 tiff to permitting the defendants to file a motion to dismiss after the court had sustained the plaintiff's demurrer to the defendants' plea in abatement.

6. The court erred in overruling the plaintiff's objection to its finding the indictment defective.

7. The court erred in overruling the plaintiff's objection to the direction of a verdict of not guilty by the jury.

8. The court erred in overruling the plaintiff's objection to its receiving a verdict of not guilty from the jury.

EDWARD L. SMITH,
United States Attorney.
GEORGE H. COHEN,
Ass't. U. S. Attorney.
ARCHIBALD PALMER, Esq.,
Of Counsel.

[File endorsement omitted.]

41 [Citation in usual form showing service on David E. Fitzgerald et al., filed June 6, 1922, omitted in printing.]
[File endorsement omitted.]

42 In United States District Court

Clerk's certificate

Filed June 6, 1922

UNITED STATES OF AMERICA,
District of Connecticut, ss:

I, Charles E. Pickett, clerk of the District Court of the United States of America for the District of Connecticut, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages numbered from — to —, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of the United States of America, plaintiff in error against Joseph Weissman et al., defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New Haven in the District of Connecticut, this 6" day of June, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty-sixth.

CHARLES E. PICKETT, *Clerk.*

[Filed endorsement omitted.]

43 In United States District Court

[Title omitted.]

Appearances of counsel:

Edward L. Smith, Esq., United States attorney; George H. Cohen, Esq., asst. U. S. attorney; Archibald Palmer, Esq., special assistant, for the Government.

Benj. Slade, Esq.; Charles J. Martin, Esq.; S. Bennett Alderman, Esq.; Sam. H. Platcow, Esq., for defendants Joseph Weissman,

Aaron Weissman, Maurice L. Estoff, Louis Wolfe, Isador Zeitsoff, Jacob Anschelowitz, Morris Renkoff, Isidor Gross.

44 David E. Fitzgerald, Esq.; A. B. O'Keefe, Esq., for defendants Jacob Goldsmith, Harry Lieder, Eli Cohen, Samuel Geller, Nathan Wittkin, Samuel Falck, Leon Abrams, Morris Lebov, Louis Turner, Louis Kaplan.

F. S. Bergin, Esq., for defendants Louis Lande, Barney Wilson, Louis Hertzberg.

(Jurors selected until panel exhausted, nine jurors being in the box.)

(Adjournment taken at 12 m. to Thursday, March 2nd, 1922, at 10.30 o'clock a. m.)

45 TUESDAY, *March 2, 1922—10.30 a. m.*

Met pursuant to adjournment.

Same appearances.

(Empaneling of jurors completed.)

46 Mr. SLADE. Is the jury satisfactory to you?

Mr. COHEN. Yes.

Mr. SLADE. In behalf of my clients the jury is satisfactory.

Mr. COHEN. If the court please, before the jury is sworn may I suggest that the clerk call the roll of the defendants to see if they are here.

The CLERK OF THE COURT. The defendants in this case will please rise and answer as their names are called:

Joseph Weissman: Present.
Jacob Anschelowitz: Present.
Moses Perlow: Present.
Maurice L. Estoff: Present.
Morris Jolles: Absent.
Aaron B. Weissman: Present.
Harry Lieder: Present.
Eli Cohen: Present.
Samuel Falck: Present.
Isidor Zeitsoff: Present.
Louis Kaplan: Present.
Philip Martin: Absent.
Nathan Wittkin: Present.
Isidor Gross: Absent.
Samuel Geller: Present.

47 Jacob Goldsmith: Present.
Louis Hartzberg: Absent.
Louis Lande: Absent.
Leon Abrams: Present.
Israel Levinson: Absent.
Barney Wilson: Absent.

Mr. SLADE. He was here this morning. He may be in the hall there. Mr. Gross is also here. May I suggest that the marshal announce that all the parties in the hall come in?

The COURT. Yes; Mr. Marshal, see that everybody in the hall that is a defendant comes in here.

The CLERK OF THE COURT. Morris Lebov: Present.

Morris Renkoff: Present.

Morris Nalitsky: Present.

Louis Turner: Present.

Mr. BERGIN. Mr. Hertzberg was here yesterday morning, your honor, and possibly the storm may have delayed him. He returned to New York, I know.

Mr. FITZGERALD. I understand Mr. Levinson is dead. Levinson has gone to a higher tribunal. I do not represent him, but I was told that.

48 Mr. COHEN. What does the court wish to do in regard to this? Shall we give them until a later time during the day to appear? I do not see how we can do that.

Mr. SLADE. A little louder, please.

Mr. COHEN. I was asking the court what the court wants to do in this matter. This being a criminal matter these men should be here to have the case valid as far as they are concerned. I have it that Jolles, Martin, Hertzberg, Lande, and Levinson are not here. Mr. Fitzgerald thinks that Levinson is dead. Now, we don't know anything about him.

Mr. FITZGERALD. I don't know either. I was told that.

Mr. SLADE. I confirm the rumor, but I don't know anything about the fact.

The COURT. Doesn't his lawyer know?

Mr. SLADE. I don't know who his counsel is, if he had any. Does the record disclose who the attorney is?

The COURT. I do not see quite how we can start to trial of a criminal case without the defendants.

Mr. COHEN. The proceedings would be invalid if they were not present, your honor.

49 Mr. BERGIN. I spoke to the clerk to-day in regard to Mr. Lande. When he failed to appear yesterday I got in touch with him on the telephone and talked with him, and Mr. Lande appeared to understand what he was doing by not appearing here yesterday, he signified as much to me over the phone, and I told the court this morning I was filing my withdrawal of appearance, with the court's approval, if I obtained that approval.

The CLERK OF THE COURT. Abraham A. Hoffman, of New York, represented Martin and Levinson.

The COURT. Were counsel notified, Mr. Cohen?

Mr. COHEN. At the time we sent out notices I wired Mr. Hoffman, of New York.

The COURT. Did you hear from him?

Mr. COHEN. No. Does the court want to give these men an opportunity to get here by noon, or within an hour, or by 2 o'clock?

The COURT. I do not know quite what to do. I do not want to delay. I want to go on, but I do not see how I am going on without all the defendants here.

Mr. COHEN. I think the only thing we can do, your honor, is to adjourn until 2 o'clock and give these people a chance to get here and perhaps give their counsel a chance to get in touch with them.

The COURT. Is there any objection?

50 Mr. SLADE. No objection.

Mr. COHEN. May I suggest when the court adjourns that these jurymen, although they have not been sworn, be taken in charge by the marshal?

The COURT. What do you mean? Just from now until 2 o'clock?

Mr. COHEN. They have not been sworn.

The COURT. You mean until they are sworn?

Mr. COHEN. Yes.

The COURT. That is all right. I will excuse you twelve men that are in the panel now in charge of the marshal until 2 o'clock. I think perhaps all the others who have been summoned this morning, who have not been excused, may go with these twelve with the marshal.

Mr. COHEN. Just a moment, if your honor please. Would your honor consider a motion to sever these defendants?

The COURT. What do you mean, "sever them"?

Mr. COHEN. Sever them and have them tried separately.

Mr. FITZGERALD. Do you know anything about these men yourself, or your associates?

Mr. COHEN. No.

51 Mr. FITZGERALD. Do you know anything them, Mr. Palmer?

Mr. PALMER. About what?

Mr. FITZGERALD. You might be able to inform the court whether or not you think at 2 o'clock these men are going to be here.

Mr. PALMER. I have absolutely no knowledge at all about Mr.——

Mr. FITZGERALD. Tell us those you have knowledge of. That is what we would like to know.

Mr. PALMER. No knowledge at all about Mr. Martin, Mr. Hertzberg, or Mr. Levinson.

Mr. FITZGERALD. Now, about those you have knowledge of? Why don't you tell his honor about those?

Mr. PALMER. The only one we have any knowledge of is Mr. Lande.

Mr. FITZGERALD. He is the man that talked with Mr. Bergin on the telephone, your honor will recall. I think the Government's representatives ought to tell your honor if they have any facts. Let us have them out.

The COURT. What did Mr. Lande say to you about coming here?

Mr. PALMER. Mr. Lande will be here, your honor, whenever we desire to have him here, on behalf of the Government.

52 Mr. FITZGERALD. I supposed we were trying a case, and here is one of the men indicted; it is a peculiar situation, at least it strikes me so. As far as my clients are concerned we want to go on with this trial, and now it appears that one of these men indicted is in communication with one of the Government attorneys and telling the Government's attorney he is going to come here when he is wanted. According to Brother Cohen everybody has been notified to be here on the first of March. It does strike me as a most peculiar situation.

Mr. COHEN. If the court please, we have absolutely no knowledge about the whereabouts of Martin, Hertzberg, and Levinson. We will be ready to proceed with the case regardless of Jolles and Lande. We are not concealing anything, and when the proper time comes the proper information will be given, but these three defendants—Martin, Hertzberg, and Levinson—should be here, as well as the rest. We can't go on without those three.

Mr. FITZGERALD. This is peculiar, and I think it is only fair to these other people who have answered the summons of the court and counsel for the Government—it now appears that there are two men that they know about, two of these defendants, Jolles and Lande.

53 The COURT. I think the best way to handle this would be to adjourn until two o'clock to give them all an opportunity to be here.

Mr. SLADE. May it please your honor, may I make this suggestion, in view of what has been stated by the assistant to the district attorney, in regard to Mr. Lande, it is at least reasonable to assume that he has been given some directions in regard to nonappearance this morning. It seems to me that he is a defendant jointly indicted with the other defendants and should be here to respond to the demands under the indictment, and neither the assistant to the district attorney nor anyone else had any right to give any such instructions, whatever course the Government might see fit to take in respect to that matter later that is not for me to criticize, but I do respectfully suggest to your honor, if my assumption is correct, that the gentleman be advised to have the men here under indictment, and the court will make whatever disposition of his case the court might see fit to take.

The COURT. We will adjourn until these defendants are here. Gentlemen of the jury, you may retire.

(Recess to 2 p. m.)

54 AFTER RECESS

Mr. COHEN. If the court please, as far as Louis Lande is concerned, he is on his way here and will get here on the very first train from New York, which is about half-past two.

The COURT. Have you any information respecting the other absentees?

Mr. BERGIN. Mr. Hertzberg is here, if your honor please.

Mr. SLADE. Mr. Wolfe is here.

Mr. COHN. He was not absent.

The COURT. Then, outside of Lande, who is absent?

Mr. COHEN. Jolles, Martin, and Levinson. We haven't any knowledge about the rest of them; I mean as far as these others are concerned.

The COURT. Are the other absentees from New York?

Mr. COHEN. Martin and Levinson, I don't know where they come from, your honor.

The COURT. Who appears for Martin and Levinson?

Mr. FITZGERALD. They said this morning that Mr. Hoffman appeared for Levinson at the other trial.

The COURT. We have not seen Mr. Hoffman here. I wonder if he was notified.

55 Mr. COHEN. I personally sent Mr. Hoffman a wire in New York.

The COURT. Hoffman appears for both of them. I suggest that we take a recess further until Mr. Lande comes.

Mr. COHEN. Shall I get in touch with Mr. Hoffman?

The COURT. And you get in touch with Mr. Hoffman with reference to Martin and Levinson.

(Recess to 3 p. m.)

Mr. COHEN. Now, if the court please, we have been unable to locate any attorney by the name of Hoffman, and are therefore unable to get in communication with the other defendants, and for that reason the Government moves that the bonds in those two cases be called—in the cases of Martin and Levinson.

The COURT. It is so ordered.

Mr. COHEN. May the jury be sworn?

The COURT. Swear the jury, Mr. Clerk.

(The jury was thereupon duly sworn.)

The COURT. Hearing no objection, I assumed that the jury was satisfactory to both the Government and the defense. I failed to ask that formal question. Are they satisfactory?

Mr. SLADE. Yes, your honor.

56 The COURT. Satisfactory to the Government?

Mr. COHEN. Yes.

Mr. COHEN. If the court please, at this time the Government recommends to the court that nolles be entered and the indictment be dismissed as against the following defendants: Harry Liesler, Isador Zeitsoff, Isidor Gross, Sam Geller, Jacob Goldsmith, Leon Abrams, Morris Jolles and Louis Lande, eight in all.

The COURT. Nolles may be entered in the cases named by the Government's attorney.

The CLERK OF THE COURT. The defendants whose names I call will please step forward and occupy these chairs in front: Joseph Weissman, Jacob Anschelowitz, Moses Perlow, Maurice Estoff, Aaron B.

Weissman, Eli Cohen, Samuel Falck, Louis Kaplan, Nathan Wittkin, Louis Hertzberg, Barney Wilson, Louis Wolfe, Morris Lebov, Morris Renkoff, Morris Nalitsky, Louis Turner.

Mr. COHEN. If the court please, I have been asked to read this indictment in order that the defendants may plead, if they have not already pleaded.

Mr. FITZGERALD. They did plead and withdrew them to file motions.

57 Mr. COHEN. Yes, the pleas were withdrawn to file motions.

The CLERK OF THE COURT. The defendants will listen to the reading of the indictment and enter your plea guilty or not guilty.

Mr. SLADE. May it please your honor, on behalf of my clients we waive the reading of the indictment and pleas of not guilty are offered in behalf of those whom I represent. I do that in economy of time.

The CLERK OF THE COURT. These defendants whose names I have called, are you familiar with the charges against you? And do you waive the reading of the indictment, and are you ready to enter a plea?

MOSES PERLOW. I am not familiar with the indictment. I have no attorney.

Mr. COHEN (reading indictment as follows):

58 The CLERK OF THE COURT, Joseph Weissman, is your plea guilty or not guilty?

JOSEPH WEISSMAN. Not guilty.

The CLERK OF THE COURT. Jacob Anschelowitz, is your plea guilty or not guilty?

JACOB ANSCHELOWITZ. Not guilty.

The CLERK OF THE COURT. Moses Perlow: Not guilty.

Morris Estoff: Not guilty.

Aaron B. Weissman: Not guilty.

Eli: Cohen: Not guilty.

Sam Falck: Not guilty.

Louis Kaplan: Not guilty.

Nathan Wittkin: Not guilty.

Louis Hertzberg: Not guilty.

Barney Wilson: Not guilty.

Louis Wolfe: Not guilty.

Morris Lebov: Not guilty.

Morris Renkoff: Not guilty.

Morris Nalitsky: Not guilty.

Louis Turner: Not guilty.

The COURT. Proceed with the evidence.

Mr. SLADE. May it please your honor, I desire to file a

59 motion with the court to dismiss this indictment. The motion involves an argument which will embrace a great many facts that I do not believe the jury ought to hear. I would therefore suggest to your honor that your honor dismiss the jury while the motion is being presented.

Mr. COHEN. Your honor, we had understood that all motions were to be made, filed with the clerk of the court by the 24th day of February. I believe we sent telegrams to that effect to all counsel.

Mr. FITZGERALD. These could not be filed.

Mr. SLADE. Filing a motion to dismiss is proper at any time. I kept my agreement with the district attorney's office when I informed him that the people I represented would enter pleas of not guilty. They have done so.

Mr. COHEN. At the suggestion of Judge Thomas all counsel were notified that all motions were to be filed with the clerk of the district court by the 24th day of February, and such telegrams were sent.

Mr. SLADE. They attack the jurisdiction of the court, and the court the cases.

Mr. FITZGERALD. These motions could not be filed until now.

Mr. SLADE. They attack the jurisdiction of the court, and the court has to hear them at any time.

30 The COURT. Is your motion a jurisdictional question?

Mr. SLADE. It is, your honor.

The COURT. I support the fundamental rule is that jurisdictional questions are always open to attack at any time during the proceeding, even after a charge to the jury for that matter. It will have to be entertained.

I will excuse the jury until next Monday morning at 10.30 o'clock. Before you go I will give you the usual caution not to read anything in any paper concerning this case. The indictment has been read to you and now you are familiar with what it is. You are not to converse with anybody about the case; you are not to converse among yourselves about the case. When you reach your jury room to consider the verdict will be the time to discuss that among yourselves. I think that covers the general instructions. You may now retire and be excused, gentlemen, until Monday morning at 10.30.

(The jury then retired.)

Mr. COHEN. Your honor, I suppose the same thing may be said about the witnesses?

The COURT. All witnesses, the same.

Mr. COHEN. All witnesses excused until 10.30 Monday morning.

The COURT. You may proceed.

61 Mr. SLADE. May it please your honor, in discussing this motion it seems to me important to suggest that it becomes necessary to have a separate discussion in regard to each count for they stand upon a different ground, except in so far as some of the general principles of law that I will call your honor's attention to affect the question raised under both counts.

The first count of the indictment is predicated upon section 5440 of the Revised Statute, also known as section 37 of the Penal Code, which defines the crime of conspiracy in the following language:

"If two or more persons conspire to commit an offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of the parties do an act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished not more than $10,000 or imprisonment for not more than two years, or both."

The first count of the indictment at its conclusion indicates that it is claimed to be particularly founded upon section 29B of the bankruptcy act of 1898. The section in question reads as follows:

62 "A person shall be punished by imprisonment not to exceed two years upon conviction of the offense of having knowingly and fraudulently, first, concealed while a bankrupt (and may I urge upon your honor the importance of bearing in mind the emphasis I place upon the words 'while a bankrupt') or after his discharge from his trustee any of the property belonging to his estate in bankruptcy."

The emphasis on the words "property belonging to his estate in bankruptcy" are important in consideration of the questions that are raised upon this motion.

In the detail set forth in the indictment the phraseology is that these defendants between the first of April, 1919, to and including the 21st day of November, 1919, "conspired and confederated to willfully, knowingly, unlawfully, and feloniously fraudulently to conceal while said Joseph Weissman should be a bankrupt, as aforesaid, from the trustee in bankruptcy of the estate of said Joseph Weissman, bankrupt, money and merchandise to the amount of $100,000, and certain other moneys and properties of divers kinds, the amount, quality, kind, particular, and description of which are to the grand jurors unknown."

63 This language should be carefully noted, if the court please, because I shall have occasion to refer to it later. I am reading now from page 2 of the first count of the indictment, which again sets forth that all these defendants conspired, commencing with the first day of April, 1919, and ending with the 21st day of November, 1919. From the allegation of this indictment the alleged conspiracy terminated on the 21st day of November, 1919, except in so far as the Government may contend that the latter portion of that paragraph reading, "To knowingly and fraudulently conceal while the said Joseph Weissman should be a bankrupt, from the trustee in bankruptcy, the estate of said Joseph Weissman," not the property belonging to the bankrupt estate as provided for in section 29D of the bankruptcy act; that is, it must be property belonging to the estate in bankruptcy.

For the sake of argument I am going to assume, if your honor pleases, in the discussion of this motion, that while the language does not warrant the inference that the Government intended to plead, that the property said to be involved is the property of the estate in

bankruptcy, but for the sake of this argument it might be assumed to be such.

The first count of this indictment is predicated upon two decisions, if your honor please, in the United States. One is United
64 States against Cohn and the other is United States against Radin, 25 American Bankruptcy Reporter 357. United States against Cohn is 15 American Bankruptcy Reporter, page 357. I think it is also cited in 142 Federal Reporter, page 983, and it is also cited in 157 Federal Reporter 651. This case was decided by Judge Holt in 1906 and is the first case in the United States affecting the question under the bankruptcy act of 1898.

In that case Judge Holt held that a conspiracy to violate section 929 of the bankruptcy act may exist though no bankruptcy actually occurred after the alleged conspiracy was entered into to conceal assets from a trustee in anticipation of proceedings in bankruptcy.

The court in discussing the indictment involved in the Cohn case found that the bankrupt in consequence of the alleged conspiracy, as set forth in the indictment, failed to include in his petition in bankruptcy, because of said conspiracy, the property which it was alleged was removed and concealed, and it was intentionally so omitted and was kept concealed from the trustee after his appointment and qualification.

May I stop here for a moment? The distinction between the Cohn case and the case at bar is the specific allegation that the
65 property concealed in pursuance to the conspiracy, such concealment was continued after the appointment of the trustee, who, under the bankruptcy act, takes title to the property, and because of such continuous concealment it was, of course, a continuous conspiracy to conceal.

Judge Holt, nevertheless, in that case laid down by way of obiter dicta this proposition of law. Judge Holt said: "The true test is, could a conviction be had if no bankruptcy proceedings were ever taken?" And the Circuit Court of Appeals was not called upon to comment upon that alleged proposition of law, but determined the case upon a proposition that the concealment being continuous the law was violated.

In the Radin case, that I will read to your honor a little later, the Circuit Court of Appeals, in subscribing to the doctrine in the Cohn case, says: "No case has been called to our attention by counsel for the appellant which would sustain the proposition that there can be no conspiracy to violate the bankruptcy act in the absence of an actual case in bankruptcy."

That is the proposition of law that I want to present for your honor's consideration. When the Cohn case was decided and
66 the Radin case was decided evidently neither counsel in those cases nor the Circuit Court of Appeals made a careful research of the law, for we shall endeavor to convince your honor that the United States Supreme Court determined that very question in

the case of Fox against the United States, which was decided by the United States Supreme Court on the 7th day of January, 1878, under the bankruptcy act of 1867. The bankruptcy act of that year or of that time provided that any bankrupt who shall within the period of four months prior to the adjudication in bankruptcy go into the market and purchase goods under false pretenses for the purpose of defrauding creditors, that such person, if adjudicated a bankrupt within four months from the time of the purchase of such goods, shall be guilty of the offense prescribed by that act.

The language of that act was as follows: "Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor, who within three months before their commencement, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud, shall be punished by imprisonment for a period of not exceeding three years."

67 The indictment then, within the language of the statute, charged the defendant with having violated that portion of the statute, and he was convicted. The case went up to the United States Supreme Court, and the court upon review says this:

I have omitted to accurately state the facts.

The defendant was convicted and upon appeal to the Circuit Court of Appeals there was a division of opinion between the judges as to what the law was and the judges certified to the Supreme Court of the United States the question of law involved upon which they were divided, and the question certified was as follows:

"If a person shall engage in a transaction which at the time of its occurrence is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretenses, and if subsequently thereto proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction, considered in connection with the proceedings in bankruptcy?"

"The question presented by the certificate of division does not appear to us difficult of solution. Upon principle, an act
68 which is not an offense at the time it is committed can not become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit, upon false pretenses, is made an offense against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offense must exist when the act complained of is done; it can not be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offense, one act being auxiliary to another in carrying out the

criminal design. But the present is not a case of that kind. Here an act which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceedings may or may not be subsequently taken, either by the party or by another."

In fairness to the Government, I want to state in connection with what I have just read, that the theory of the Government as based on the language used in the indictment is that the alleged unlawful acts done were in contemplation of bankruptcy, and that is the doctrine laid down by the Circuit Court in the Cohen case and in
69 the Radin case, and that very question, if the court please, was involved in this case.

The Supreme Court of the United States in discussing the powers of Congress to pass legislation in pursuance of the Constitution of the United States regulating the enactment of uniform bankruptcy laws, the Supreme Court said:

"Congress had ample power to say that any act done in contemplation of bankruptcy shall be a crime, but unless Congress did say so there is no such crime. There is no doubt of the competency of Congress to provide by suitable penalties for the enforcement of all legislation necessary or proper to the execution of powers with which it is entrusted, and as it is authorized to establish uniform laws on the subject of bankruptcies throughout the United States it may embrace within its legislation whatever may be deemed important to a complete and effective bankruptcy system. To legislate for the prevention of frauds in either of these particulars, when committed in contemplation of bankruptcy, would seem to be within the competency of Congress. Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such leg-
70 islation, may properly be made an offense against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, can not be made an offense against the United States unless it has some relation to the execution of a power of Congress or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate.

"The act described in the ninth subdivision of section 5132 of the Revised Statutes is one which concerns only the State in which it is committed; it does not concern the United States. It is quite possible that the framers of the statute intended it apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we can not supply qualifications which the legislator has failed to express."

So that we have the doctrine of the United States Supreme Court upon this proposition. There is no such offense in the United States as set forth in this indictment because of the allegation that it is done in contemplation of bankruptcy, with all due respect to the Cir-

cuit Court of Appeals. They have not cited the Fox case, neither in the briefs of counsel nor in the decision of the court, and
71 upon principle, if the court pleases, the doctrine in the Fox case must be the law, for this reason: The United States courts have only jurisdiction of such offenses as are prescribed by express legislation. If there is no express legislation there is no offense, so that the legislation must first define the offense, define the offenders, and prescribe the punishment, and unless those three elements are present there can be no offense against the United States.

Let me call your honor's attention to a recent decision on that subject, Field versus United States, in 137.

A curious situation, if the court pleases, exists in regard to the Radin case that I am going to call your honor's attention to later. A writ of certiorari was taken up to the United States Supreme Court, and in the exercise of their discretion under the act governing the consideration of writs of certiorari, they simply dismissed it and refused to consider it, and I can see now the reason why they didn't do it. They realized the application of the doctrine in Fox against United States, and because of public policy did not want to exercise their discretion in being called upon to reconsider the alleged doctrine of law set down in the Cohn case.

72 But upon the very point of the Government not having jurisdiction over any offense unless the offense is defined, prescribed by statute, the case of Field against the United States, decided by the Circuit Court of Appeals in the Eighth Circuit, as late as the 7th of April, 1905, found in 137 Federal Reporter, in that case an attempt was made to prosecute an officer of a corporation for violation of section 29B by claiming that he, as the officer of that corporation, had taken and concealed assets belonging to the corporation which was adjudicated a bankrupt. Upon review (Judge Sanborn wrote the opinion) and he said, "The plaintiff in error who was not a bankrupt, but who was a vice president and one of the directors of the Brown-Rollosson Company, a corporation which was a bankrupt, was indicted, a demurrer to the indictment was overruled, and he was convicted under section 29B of the bankruptcy law of July 1, 1898, of the offense of having knowingly and fraudulently concealed property which belonged to the estate of the corporation in bankruptcy from its trustee.

"Neither the offense nor the punishment here described exists under the common law. They are the creatures of the act of Congress. In the absence of that act no one could be legally punished by
73 imprisonment for having concealed property from his trustee in bankruptcy. In the presence of the act, therefore, no one can be lawfully punished by imprisonment for this concealment who is not by the terms of the statute subject to this punishment. The act specifically designates the persons liable to the punishment which it prescribes."

Who are they, if the court please?

"A person shall be punished by imprisonment not to exceed two years upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee in bankruptcy, the property belonging to the estate in bankruptcy."

"The act specifically designates the persons liable to the punishment which it prescribes. They are those who commit the offense denounced while they are bankrupts or after they have received their discharges in bankruptcy. Under a familiar rule, this specification by the statute of those who are bankrupts, and those who have been bankrupts, as the persons liable to the punishment, necessarily excludes all others from that liability, and no other person can be lawfully punished under this section for the offense it denounces. As the plaintiff in error was not and never had been a bankrupt, it is
74 difficult to perceive how he could have been guilty of the offense of having concealed while a bankrupt, or after his discharge, from the trustee any of his estate in bankruptcy.

"The argument by which counsel attempt to sustain the indictment and conviction is that clause 19 of section 1 of the bankruptcy law broadens the meaning of section 29B so that it includes the officers of a bankrupt corporation, who conceal the property of its estate in bankruptcy from its trustee, in the class subject to the punishment it prescribes. That clause reads in this way:

"'Persons' shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations."

"A careful reading of this clause, however, in connection with the terms of section 29B, convinces that it can have no effect to extend the terms or broaden the true interpretation of the latter subsection. All who are punishable under this subsection 29B are
75 persons who are or who have been bankrupts. Hence none of those whom the word 'persons' is made to include under section 1, cl. 19, no officers, partnerships, women, participants in forbidden acts, agents, officers, or members of any board of directors or trustees can be guilty of the offense specified in this subsection unless they are either bankrupts when they conceal the property, or have been such and have obtained their discharges before that time. Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute."

How are you going to get away from that?

"Since the plaintiff in error was not a bankrupt when he was charged with concealing the property of the corporation, since he had never been a bankrupt and had not been discharged from bankruptcy, and since he had neither estate in bankruptcy nor trustee therein, he could not have concealed while a bankrupt or after dis-

charge any of the property belonging to his estate in bankruptcy from his trustee and he was not amenable to the punishment prescribed by section 29B.

"The suggestion that concealment by an officer of a bankrupt corporation of the property of its estate in bankruptcy from its
76 trustee is clearly within the mischief of this subsection, and therefore within its true interpretation, is unworthy of serious consideration. A panel statute which creates and denounces a new offense must be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified by such a statute. An act which is not clearly an offense by the express will of the Legislative Department of the Government must not be made so after its commission by a broad construction adopted by the judiciary. The definition of the offense and the classification of the offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and unambiguous in its terms the courts may not lawfully extend it by construction to a class of persons who are excluded from its effect by its terms, because in their opinion the acts of the latter are as mischievous as those of the class whose deeds the statute denounces."

"The judgment below must be reversed and the case must be remanded to the District Court with instructions to sustain the demurrer to the indictment and to discharge the plaintiff in error, and it is so ordered."

Now, you can't get away from that doctrine, if the court pleases. It is impossible upon any sound logical legal reasoning to get away from it.

77 Let me attempt further to point out what a serious error the Circuit Court of Appeals made when they decided the Radin and the Cohn cases. They cite in the Radin case this example. They cite the case of Reg versus Banks in 12 Cox, C. C. 393, Circuit Court opinions, which involved this proposition. I am not going to take the time to read the full details—25 American Bankruptcy Reporter, page 647. That is the Radin case. We will hand your honor a memorandum of these citations so you need not bother with taking them now.

They cite this Reg versus Banks case as an authority in support of the obiter dicta laid down in the Cohn case that a conspiracy to conceal assets can exist even though there was never a bankruptcy proceeding, and in support of that proposition they cite this Reg case. The Reg case was a conspiracy to commit murder of an unborn child, and the court sustained the conviction, but the court had failed to see the distinction between the two cases. There is a statute of the United States which makes it a crime to commit murder. It is in existence. It was always an offense defined by statute, hence a conspiracy to do the forbidden act, which is itself described as a crime at the time of the conspiracy, comes

directly within the statute, but that doctrine can not be
78 recognized in a bankruptcy case for this reason: The United States courts have no jurisdiction in a bankruptcy case until there is a proceeding in bankruptcy. There is no statute, as said by the Supreme Court in the Fox case, if you do an act in contemplation of bankruptcy, you shall have committed an offense. In the presence of such statute a conspiracy to violate such statute would constitute a crime, but we are not confronted with that situation here. Here we have a bankruptcy act which confers jurisdiction upon the United States courts either in voluntary or in involuntary proceedings in bankruptcy. Now, that jurisdiction does not attach and is not effective until there is in fact filed a petition in bankruptcy. The moment such petition is filed jurisdiction attaches. Any act that might be done from the time that the bankruptcy becomes effective by virtue of such decision may be a violation of law and a violation of section 5440.

As I said to your honor, this is not a new principle. I am going to cite your honor case after case upon that proposition.

United States versus Dietrich, found in 126 Federal Reporter, decided by the Circuit Court in January, 1904. There an
79 attempt was made to prosecute the defendant, who was a Member-elect of Congress, for a conspiracy to receive a bribe in violation of a statute of the United States, which made it an offense for anyone who is a Member of Congress, or an officer of the United States, to receive a bribe.

The Circuit Court of Appeals held it was impossible for that man to commit the offense, because at the time of the alleged acts he was not yet a Member of Congress, but merely a Member-elect, and as such did not come within the language of the statute.

Again, if the court please, I feel justified in calling your honor's attention to section 29B. I say it is impossible to create inferentially an offense giving jurisdiction to the United States court in the absence of a statute conferring such jurisdiction.

In the case of Pettibone versus United States, the opinion delivered by Chief Justice Fuller, Chief Justice of the Supreme Court of the United States. I am reading now from the syllabus of the case, if the court please. The question involved, "In an indictment all the material facts and circumstances embraced in the definition of the offense must be stated or the indictment will be defective;
80 any essential element of the crime can not be supplied by implication.

Courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States.

"A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

"When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out.

"A person can not be convicted of obstructing the administration of justice in a Federal court under United States Revised Statutes, because of a criminal intent on their part to commit a crime against the State.

"Where there is a conviction for a conspiracy to obstruct the due administration of justice in the Circuit Court of the United States, but there were no averments in the indictment that it was the purpose of the conspiracy to obstruct the course of justice in that
81 court or that defendants were notified of the pendency of any proceedings in that court, the conviction can not be sustained.

"A person is not sufficiently charged with obstructing or impeding the due administration of justice in a court, under United States Revised Statutes, unless it appears in the indictment that he knew or had notice that justice was being administered in such court, without such knowledge or notice the evil intent is lacking, and the specific intent to violate the statute must exist to justify a conviction."

The statute in that case made it an offense for anyone to conspire to obstruct justice in a case pending in a United States court. The parties there conspired, were charged in the indictment with conspiring to violate that statue, but it turned out that there was no case pending in the United States court, and the Supreme Court said there can be no offense.

Now, applying that doctrine to the case again here, there is such a thing as a conspiracy to commit any offense prescribed by the laws of the United States under section 5440, or section 37 of the Code, a conspiracy to violate any law of the United States, or to defraud the United States; hence, at the time of the conspiracy it
82 must involve, at the time the concerted action took place and the overt acts occurred, that it involved a conspiracy to violate an existing law of the United States.

Let me put the proposition in its inverse order. Under the Constitution of the United States Congress has a right to pass this uniform bankruptcy law. Would anybody say, if the court pleases, that in the absence of any bankruptcy law, or which was contemplated by Congress but not yet passed, that a conspiracy to violate that bankruptcy law could be an offense?

I am quite certain the learned gentlemen representing the Government will have to answer that proposition in the negative, and if they answer that proposition in the negative the foundation for their position is gone, for this reason: That in law the existence of the

bankruptcy act is no more effectual than if it had never been passed, until there is a proceeding in bankruptcy.

Take another proposition, if the court pleases, by way of example. The United States courts by virtue of the tariff act, or other legislation, has jurisdiction over common carriers in regard to tariffs or charges to be made for transportation, according to schedules filed with the Commerce Department, or whatever other
83 governmental department there may exist.

That act involved these elements: There must be a transporter engaged in interstate commerce whose duty it is to file a tariff schedule in accordance with the law and whose duty it is to comply with that law, and any agreement or conspiracy to violate that law constitutes a crime under section 37.

Supposing, for the sake of example, I come to your honor and I say, "Judge, I intend to build a railroad between the State of Connecticut and the State of Maine, and you are a good friend of mine, you ship molasses from Connecticut to Maine, or vice versa, and under the tariff laws of this country the price for shipment for that destination of that class of goods is $2 a barrel, but I agree with you that when I build that railroad I will ship your molasses for 25 cents a barrel. We perform the overt act in executing an agreement reciting or embracing the agreement I made with you. I have violated the United States conspiracy statute because of an alleged violation of the tariff laws of this Government, and the answer must again be no. Why? Because jurisdiction in the Government attaches only between the common carrier engaged in interstate commerce who is subject to the law requiring the regulation of tariff,
84 and there can be no violation of any law, and again we go down to the proposition in regard to the pendency of a bankruptcy proceeding.

Mark you, if the Court pleases, this doctrine is centered around and riveted to one single important indispensable element. The doctrine in the Cohn case and in the Radin case, and the language in the indictment in the case at bar is directed upon this one proposition, that these people are said to have done certain things in contemplation of bankruptcy, and the Supreme Court of the United States said that Congress has the power to enact such legislation, but until it does so it is not the duty of the court by judicial construction to create law. It can not be done. That is the duty left to Congress. Congress has a perfect right to say under this uniform bankruptcy law, the purpose of which is the equitable distribution of a bankrupt of his property among his creditors, and to give him a discharge in bankruptcy if he had himself not violated the law; that in order to carry out the object and purpose of that law we shall prescribe that any person who shall directly or indirectly assist, counsel, abet, or otherwise help the bankrupt in anticipation of bankruptcy to do any act, or fail to do any act, shall be guilty of

a crime. In the presence of such legislation section 5440
85 would have its full application and force.

I want to perhaps call your honor's attention to one very significant fact. Your honor will find upon examination of the Cohn case, United States against Cohn, that I have already referred to, that the reporter appended a note from the New York Law Journal, your honor is familiar with the Law Journal in New York, which is the official organ among the bench and bar, and I want to impose upon your honor's time and patience to read that:

"The New York Law Journal, in commenting upon this case, says: 'Nothing could aid as powerfully in fostering and increasing satisfaction with the national system as the actual suppression of fraudulent abuses. To this end, we would repeat the suggestion heretofore made for amendment of the law. Great credit is due to the Federal district attorney's office for the indefatigable prosecution of the present conspiracy cases, as well as to Mr. Julius Henry Cohen, who was appointed special United States district attorney and successfully conducted the somewhat novel litigations in court. The District Court and the public prosecutors have certainly shown a disposition to do everything that can be done to stamp out perjury and general fraudulent practices. But a prosecution for con-
86 spiracy is always necessarily a laborious, cumbersome affair, and, in the end, whether or not actual conspiracy has been shown, is apt to be a matter of legitimate difference of opinion. The law should be amended so as specifically and definitely to class as crimes many acts which are wont to be committed in anticipation of bankruptcy proceedings. As we remarked in our former editorial, "Under the English debtor's act of 1869, which is employed in aid of the bankruptcy law, a long list of acts or omissions of a bankrupt constituting crime is given, many of which comprise acts committed within four months before the commencement of the bankruptcy proceedings. There is no good reason why the application of our bankruptcy act should not be similarly extended, nor, as far as we can see, why those who abet and connive at fraudulent bankruptcy, in the capacity of alleged creditors or otherwise, should not also be expressly charged with criminal liability."'"

Now, that note to me is very significant, and significant for this reason: The editor of the Law Journal evidently knew of the case of United States versus Fox, and knew what the law was, and he suggests that the Canadian law has the very legislation that under our Constitution is indispensable in order to proceed successfully against any person who might do any act in contemplation of bank-
ruptcy, and the doctrine laid down by the Circuit Court of
87 the United States in the Cohn case can not be the law, and I know, if the court pleases, that this court is courageous enough to express what the law is when the question arises, and your honor is simply confronted with this proposition: Will you as judge of the District Court of the United States say that you are

going to adopt the alleged doctrine laid down in the Cohn case, or must you say that the Supreme Court of the United States has preference? And the Supreme Court of the United States said: "There can be no such thing as any offense in contemplation of bankruptcy unless the act itself so prescribed."

This will be a proper time for me to stop, your honor.

(Adjourned to March 3, 1922, 11 a. m.)

88 UNITED STATES VS. WEISSMAN ET AL.

NEW HAVEN, CONNECTICUT, *Friday, March 3, 1922.*

Appearances: Same as before.

The COURT. You may proceed.

Mr. SLADE. May it please your honor, at the close of the session yesterday I was endeavoring to present to your honor my conception of the law on the proposition that unless a crime is defined by some statute law of the United States at the time of the alleged conspiracy to violate such law, section 37 of the Criminal Code has no application.

I have cited some cases to your honor and I will impose further upon your honor's patience to present further authorities upon that point.

In the case of United States versus Crafton, found in Federal cases No. 14881, that was a prosecution for a conspiracy to defraud the United States Government, formed for the purpose of collecting from the Treasurer of the United States a claim, a bill for which was then pending before Congress, and in violation of a statute which made an attempt to defraud the Government a crime, section 5440 of the statute, the conspiracy statute, was attempted to be applied, and in passing upon the question Judge Dillon laid

89 down this doctrine:

"However fraudulent in the ulterior design, or morally reprehensible the acts charged in the indictment may be, still our judgment is that such section 5440 (which is the conspiracy statute) can not be extended to a case when the fraud which the conspiracy contemplated can only be affected in case an act of Congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurrer to the indictment must be sustained."

The material language of this portion of the opinion is "Can only be affected in cases of an act of Congress shall be thereafter passed." And that illustrates the doctrine that I contended for yesterday that the bankruptcy act as such is inoperative so far as jurisdiction of the Federal courts go until there is in fact a proceeding in bankruptcy, not necessarily an adjudication, because under the provisions of the bankruptcy act adjudication attaches the moment the petition is filed. Hence, in the absence of a proceeding in bankruptcy the bankruptcy act itself is inoperative except possibly to

the extent of recovering preferential transfers or property conveyed in fraud of creditors.

90 As to these two subjects section 70 of the bankruptcy act and the various subdivisions of that section by specific terms provide that a trustee in bankruptcy after his appointment and qualification shall have the same rights as a creditor had and may pursue properties which have been in fraud of creditors transferred within the given period, namely, the four months prescribed by the bankruptcy act; so that with these exceptions the bankruptcy act is inoperative unless there is a proceeding in bankruptcy.

Let me call your honor's attention to the case of the United States versus Grodson, which was decided two years after the Cohn case was decided. May I interpose here with this observation again, if the court pleases? It should be borne in mind that the Cohn case, as I interpret the decision, was predicated solely upon the proposition that the concealment was continuous in character and continued after the trustee was appointed who under the bankruptcy act was qualified to take and hold the property belonging to the estate. That was the theory upon which that case was decided, and I am willing to subscribe to that doctrine that if the concealment continues after there is a petition in bankruptcy the conspiracy continues, and the conspiracy continuing after the adjudication in bankruptcy

91 may be said to be within section 5440 in that as long as the conspiracy continues and an overt act is done the crime has been committed and a conspiracy to commit that crime may be sustained.

In United States versus Grodson, decided on the 21st of September, 1908, as I said, two years after the decision in the Cohn case, a demurrer was sustained against an indictment charging a conspiracy, and Judge Sanborn has this to say:

"It is made an offense by the bankruptcy law for the bankrupt to conceal property from the trustee. The act applies only to the bankrupt and does not make criminal for any other person to conceal the bankrupt's property for the purpose of preventing the trustee from receiving it." (Citing the Field case that I read to your honor yesterday.)

Your honor will recall the doctrine of the court in the Field case that the bankruptcy act specifically designates the persons that can violate it, and unless such persons are embraced within the act they can not be guilty of its violation.

The indictment is challenged because it is argued it does not allege a conspiracy to aid the bankrupt to conceal his property, but alleges a conspiracy formed before the bankruptcy, that all three de-

92 fendants should so conceal. From the first count it appears that the defendant Frederick Craber was adjudged a bankrupt on July 6th, 1907, on involuntary petition, and his trustee was appointed July 30, 1907. In April and May, 1907, Craber was in the retail clothing business in Chicago and became insolvent and the de-

fendant Grodins and Grodson knew of such insolvency. Thereupon the three defendants arranged to have a large amount of Craber's stock of the value of $4,164 shipped from his store to the defendant Grodins, and they were so shipped and remained concealed until June, 1908, not being given up by Grodins or the other defendants to the trustee in bankruptcy. No overt act of concealment occurred after the bankruptcy.

May I stop here to suggest to your honor that there is no overt act, so far as the first count is concerned in the case at bar—no overt act subsequent to the bankruptcy. The overt acts set forth in the first count are during the alleged conspiracy between the first of April and on or about the 21st day of November, and the bankruptcy did not occur—the adjudication was December 8th, about two or three weeks prior to the last day of the alleged conspiracy, and the last date mentioned as the date when any alleged overt act was committed.

Continuing, "No overt act of concealment occurred
93 after the bankruptcy. All that was done was for the defendants to fail to discover the goods, or to inform the trustee of their existence or place of concealment, and to fail to turn them over. Section 5440 provides that if two or more shall agree together to commit an offense against the United States, and one of them shall do any act to effect the object of the conspiracy, all of them shall be punished. Under this statute there must be an agreement to commit an offense, and then some overt act to carry it out. Citing Dealy against United States in 152. If the defendants had agreed before the bankruptcy to combine in order to enable Craber to go into bankruptcy, and then to secret property from his trustee, a criminal conspiracy might appear (and I am emphasizing the word 'might,' if the court please, because Judge Sanborn cites the case of Cohn versus the United States, and I will refer to that word 'might' a little later), but all that is charged is that on May 10, 1907, or two months before the bankruptcy, defendants agreed to commit the acts made an offense by section 29B by advising Craber, with knowledge of his insolvency, to pack and send away from his place of business the goods aforesaid, and pursuant thereto, he, for the purpose of defrauding his creditors, did so pack and send away and secret
94 such goods which were received and secreted by the defendant Grodins, and that Craber afterwards became bankrupt, and a trustee was appointed, and so forth."

"There is no charge that bankruptcy was contemplated, or that the secreting of the goods was done to enable Craber to secret the goods from a trustee to be afterwards appointed. Probably nothing more than a forced settlement with creditors or a fraudulent division of the spoils was anticipated. Certainly no crime is charged to have been either intended or committed. It is also charged in the first and third counts that after Craber was adjudged a bankrupt the defendants conspired to knowingly conceal from the trustee the aforesaid goods and that in pursuance of such conspiracy and to

effect the object thereof, the defendants concealed the property from the trustee, and have at no time turned it over to him, nor has any other person done so, and that the defendants still continued to conceal such property." A much stronger allegation than what we have in the case at bar in regard to present concealment. The indictment in the case at bar has no such allegation.

"(Continuing.) In other words, it is charged that defendants after they had concealed the property conspired to continue to conceal it, and did no act in furtherance thereof." That
95 is, did no overt act to continue to conceal the property after the trustee had been appointed.

"They simply failed to act. (That is, the defendant's alleged coconspirators did nothing, simply had the property.) Had they moved the property, or sold any part of it, the charge that they conspired to conceal it might possibly be sustained, although two of them could not commit the offense of concealment."

Only one could conceal, the one who had possession, either physical or constructive.

"But in the absence of this, the indictment must be held to be bad on demurrer. Overt acts committed before the formation of the conspiracy are not admissible."

Now, what the court says is this: That if the trustee had been appointed, and the goods in pursuance to a prior conspiracy had been concealed, the doing of an overt act subsequent to the attaching of jurisdiction by the Federal court might constitute a crime, but whatever they did prior to the adjudication in bankruptcy, before the Federal court had jurisdiction, cannot be a crime, and I repeat the language, "Overt acts committed before the formation of the conspiracy are not admissible." Wilson versus People, and other cases, cited.

96 "In the Cohn case, supra, the significance of negative acts of concealment is discussed with reference to their unlawfulness per se; but in that case numerous positive acts, committed after the conspiracy, were stated in the indictment."

Now, if the court please, the indictment in the case at bar upon this point reads, "That these defendants between the first day of April, 1919, and the 21st day of November, 1919, feloniously, wilfully, knowingly conspired with divers other persons to commit an offense against the United States in and by wilfully, knowingly, unlawfully, and feloniously conspiring together and with each other, and divers other persons, whose names are to the grand jurors unknown, knowingly and fraudulently to conceal while the said Joseph Weissman should be a bankrupt, from the trustee in bankruptcy of the estate of Joseph Wiessman," not of the property belonging to the bankrupt estate as provided for in section 29B of the bankruptcy act, covered by this language, section 29, "First, concealed while a bankrupt, or after his discharge from his trustee, any of the property belonging to his estate in bankruptcy"—not

concealment of property belonging to Joseph Weissman. Then it undertakes to describe the character of the property. And then an attempt is made to supply the indispensable element
97 of an overt act, and your honor will find upon examination of the indictment that every overt act is laid prior to the bankruptcy. So that under the Grodsin case, under the Cohn case, under the Field case, and under the Dietrich case it is apparent that no crime was possible because at the time of the alleged acts there was not any statute of the United States, or any provision of the bankruptcy act that could have been violated by virtue of any alleged conspiracy.

The Grodsin case is 164 Federal Reporter, page 157.

I want to call your honor's attention to the case of United States versus Benecke, found in 98 United States, page 447. The defendant in that case was charged by the United States court with the crime of withholding arrearages of pay and bounty from persons for whom he was the agent and attorney and in whose behalf he collected such arrearages and bounty. The prosecution in that case was based upon an act granting pensions passed in July, 1862. One of the sections of that act provided as follows:

"And be it further enacted that any agent or attorney who shall, directly or indirectly, demand or receive any greater compen-
98 sation for his services under this act than is prescribed in the preceding section of the act, or who shall contract or agree to prosecute any claim for a pension, bounty, or other allowance under this act, on the condition that he shall receive a percentum upon, or any portion of the amount of such claim, or who shall wrongfully withhold from a pensioner or other claimant the whole or any part of the pension or claim allowed and due to such pensioner or claimant, shall be guilty of a high misdemeanor, and upon conviction thereof for every such offense be fined not exceeding $300, or imprisoned at hard labor not exceeding two years, or both, according to the circumstances and aggravations of the offense."

The court in its opinion, speaking through Mr. Justice Miller, says:

"There is no provision in regard to services for procuring pay, nor any provision in the act regarding it. The pensions to soldiers, their widows and orphans is not pay, and the provisions for paying them are not under that act. Arrearages of pay were not collected under any pension law or through the Pension Office. What is meant by bounty here is said in the briefs to be also passed upon and paid in another bureau. The indictment is perhaps on this point a little obscure. In the sixth count the defendant is charged as
99 guilty of withholding arrearages of pay and bounty, and in the tenth with withholding pay and bounty. Since the act in which this offense is prescribed makes no provision for pay or bounty, and the fees regulated and the acts forbidden are those done in regard to that act, it seems a reasonable construction of the penal

part of the statute that withholding pay and bounty, which are not mentioned there, are not intended to be punished by the act.

"It is not in reference to pay that Congress was legislating. The persons described who may be guilty are those prosecuting claims for pensions or bounty before the Pension Office. The offense described is 'withholding from a pensioner or other claimant the whole or any part of the claim allowed and due said pensioner or claimant,' and it is but a just limitation of the word 'claimant' that he should be a claimant under that act, a claimant before the Pension Bureau. This part of the section is to be taken in connection with the taking of illegal fees, which manifestly refers to cases before the Pension Office, and which are described and punished in the same sentence and by the same penalty. The word 'bounty' is not used in this sentence, nor the word 'pay,' but the argument is that the word 'claim' includes them. We think this would be an unjustifiable extension of a penal statute beyond its terms and against its purpose."

100 So that we have another authority, that unless the act prohibited is an act within the statute it is without the statute.

In the case of United States versus Sheldon, found in 2 Wheaton U. S., that was a prosecution for a violation of the act of July, 1812, which prohibited any person residing within the United States to transfer to the enemy country (then Can'da, I believe) munitions of war or food supplies by means of vehicles, and the defendant in that case drove into Canada food supplies, oxen on hoof, and he was convicted for a violation of that statute.

The Supreme Court of the United States reversed the conviction, and in its opinion it has this to say:

"This indictment was founded on the act of July, 1812, the second section of which is that if any citizen of the United States or person inhabiting the same shall transport or attempt to transport over land or otherwise in any wagon, cart, sleigh, boat, or otherwise, naval or military stores, arms, or munitions of war, or any article of provision from the United States to Canada, the wagon, cart, sleigh, boat, or the thing by which the articles are transported or attempted to be transported, together with the articles themselves, shall be forfeited, and the persons aiding or privy to the same shall for-

101 feit to the United States a sum equal to the value of the wagon, and so forth, or thing by which the articles were transported, and shall, moreover, be considered as guilty of a misdemeanor and liable to a fine and imprisonment.

"In answer to the first question submitted to this court, we are unanimously of the opinion that living oxen are articles of provision and munition of war within the true intent and meaning of the above-recited act.

"The second question is attended with much more difficulty. Is the driving of living, fat oxen, and so forth, a transportation of them

within the true intent and meaning of the law? There is no doubt but that the word 'transport' correctly interpreted, as well as in its ordinary acceptation, means to carry, convey, and in this sense it seems to a majority of the court the legislature intended to use it. The offense is made to consist in transporting in any wagon, cart, sleight, boat, or otherwise, the prohibited article. Had the words 'or otherwise' been omitted, it would scarcely admit of a doubt that unless the prohibited articles had been conveyed in some of the enumerated vehicles no offense would have been committed within the words or the meaning of the law. What, then, is the correct interpretation of these expressions taken in connection with the
102 other parts of the section? To transport an article in a wagon or otherwise would seem necessarily to mean to carry or convey it in that or some other vehicle, by whatever name it might be distinguished. If these words are construed to mean a removal of the article from one place to another otherwise than by a vehicle, it might well admit of doubt whether a removal in a vehicle other than of those which were enumerated would be a case within the law, but, so far from this matter being left in doubt by law, we find that when the punishment by way of forfeiture is prescribed the words 'or otherwise' are very plainly construed to mean the thing by which the articles are transported, thus distinguishing between the thing which transports and the thing which is transported."

May I ask your honor's most careful attention to the language of this opinion that I am now going to read?

"It may be admitted that the mischief is the same whether the enemy be supplied with provisions in one way or the other, but this affords no good reason for construing a penal law by equity so as to extend it to cases within the correct and ordinary meaning of the expressions of the law, particularly when it is confirmed by the interpretation which the legislature has given to the same expression in the same law. If it were impossible to satisfy the words 'or otherwise' except in the way contended on the part of the
103 United States, there would be some reason for giving that interpretation to them, but it has been shown that this is not the case. It was contended by the Attorney General that these questions were in effect settled in the case of United States versus Barber, but this is clearly a mistake. The only question in that case which was referred to this court was whether that cattle were provisions or munitions of war. The decision of this court was in the affirmative, but whether the fat cattle were dead or alive, and if the latter was to be intended, whether they were driven or transported in some vehicle did not appear, and, of course, the law arising out of that state of facts was not and could not be decided. Upon the whole it is the opinion of the majority of this court that driving living, fat oxen on foot is not a transportation thereof within the true intent and meaning of the above-recited act of Congress."

Hence we have this proposition laid down by the Supreme Court: It is of no importance whether the acts complained of may or may not be as mischievous as the acts prohibited. That is of no importance. It is of no importance to consider whether a concealment subsequent to the adjudication in bankruptcy is not in character the more offensive than a concealment prior to adjudication in bankruptcy, and in contemplation there. The first case may be
104 just as abhorrent as the second, it may be just as mischievous in its effect as the second, but you must have a law which makes it an offense. And I repeat the language of the Supreme Court, "It may be admitted that the mischief is the same, whether the enemy be supplied with provisions in one way or the other."

The object sought to be accomplished by that act was to prevent the enemy from getting provisions, and I can conceive that the real intent was, it didn't make any difference how they got it, so long as they got provisions which enabled them to continue war against this country, but the Supreme Court said, this Government has no power to define any crime by implication, that the only crimes that exist are such crimes as are distinctly and specifically defined by statute, which must designate the offender, define the crime, and prescribe the punishment.

Has Congress complied with those elements in the bankruptcy act, or is there any statute of the United States that makes it a crime for persons in anticipation of bankruptcy to do the things charged in this indictment and then stop? There is no such statute. There is no such law.

Take the case of United States versus Van Auken, 96 U. S. That was a prosecution under an act of Congress approved July 17,
105 1862, which declared that no private corporation, banking association, firm, or individual, shall make, issue, circulate, or pay out any note, check, memoranda, token, or other obligation for a less sum than $1, intended to circulate as money, or to be received or used in lieu of lawful money of the United States. "A" was indicted for circulating obligations in the following form: "Bank of Michigan, August 15, 1874. The Bangor Furnace Company will pay the bearer on demand 50 cents in goods at their store in Bangor, Maine." Signed by the drawer of this voucher.

The indictment charged that he intended them to circulate as money and to be received and used in lieu of lawful money of the United States. Held: That as the obligations were payable in goods and not in money, and the sum of 50 cents was named merely as the limit of the value of the goods demandable, the indictment was bad on demurrer.

Again sustaining the doctrine that unless the offense is specifically defined, the alleged violation of that act must come strictly within the legislation that intends to forbid the act itself, and unless that is done there is no crime.

The case of United States versus Waldman, your honor, 188 Federal Reporter, page 524—this is by the Circuit Court of the South-

ern District of New York, May 15, 1911. I read now from the syllabus, if your honor pleases:

106 "Bankruptcy act makes it a criminal offense for a person to have knowingly and fraudulently concealed while a bankrupt, or after his discharge, from the trustee any of his property belonging to his estate in bankruptcy. Held that, since the act does not make it a criminal offense for a person not a bankrupt to conceal the bankrupt's property from the trustee, an indictment charging that defendants, who were in no manner officially connected, either as directors or as stockholders with the bankrupt corporation, conspired to conceal assets of the corporation from the trustee in bankruptcy, and in pursuance of such conspiracy they removed the corporation's stock of goods from its place of business and caused the same to be sold and concealed the proceeds, did not state an offense.

"Where an indictment for conspiracy to conceal the assets of a bankrupt corporation from its trustees alleged as the overt act, that defendants removed and sold the bankrupt's stock of goods and concealed the proceeds from the bankrupt's receiver and trustee, did not allege any of the circumstances under which the goods were removed, so as to show that such removal was illegal, and not under legal process, it was insufficient."

107 There is an authority squarely upon the point that a concealment by a person other than a bankrupt is not an offense, and can not be, because the bankruptcy act does not prescribe such an offense.

It is inferentially stated in this case, when the opinion is examined, that where the third person, not covered by the bankruptcy act, jointly with the bankrupt, enters into what the Government sees fit to designate a conspiracy prior to the adjudication in bankruptcy and such conspiracy continues after the adjudication in bankruptcy, that it may be an offense, recognizing the doctrine in the Cohn case.

To the same effect, if the court please, United States versus Lake, decided in 1904, found in 129 Federal Reporter:

"Bankruptcy act of July 1, 1898, providing that a person shall be punished by imprisonment on conviction of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy, must be strictly construed, and does not include officers of a corporation declared a bankrupt; the term 'bankrupt' being defined by section 1, paragraph 4, to include a person against whom
108 an involuntary petition or an application to set a composition aside, or to revoke a discharge has been filed, or who has filed a voluntary petition, or has been adjudged a bankrupt."

And necessarily excludes everybody else except the character of person defined by the bankruptcy act as defined by this court, and as I have just read.

United States versus Murphy, 3 Wallace's Reports. Upon the subject of, unless the offense is embraced within the act, it is outside of the act, is the case of United States versus Murphy, found in the third of Wallace, page 649. There a prosecution was instituted against a person for an assault and obstruction of an officer in making an enrollment of men for military duty. That was the allegation of the indictment. The prosecution was based on an act which made it an offense to obstruct an officer in making a draft or in the performance of the service in relation thereto, and the court held no offense was committed because the allegation was it was for an assault or obstruction of an officer in enrolling of men for military duty, and not in making a draft or doing anything in relation thereto.

I refer your honor to the case of in re Steed, decided in
109 1901, and found in the 107 Federal Reporter, page 682.

I will have to defer quoting that case for a little while, your honor, until I locate what I want.

In this case, if the court please, in re Adams, 171 Federal Reporter, this doctrine is laid down:

"Bankruptcy act of July 1, 1898, provides that a bankrupt shall be granted a discharge unless he has committed an offense punishable by imprisonment as provided, and section 29 provides that a person may be punished by imprisonment on conviction of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, 'from his trustee' any of the property belonging to his estate in bankruptcy. Held, that in order that such offense might be committed there must be a trustee, and hence a specification where no trustee had been appointed that the bankrupt had concealed property 'from his estate in bankruptcy' was fatally defective."

Now, if your honor pleases, how are you going to reconcile the alleged doctrine laid down by the Circuit Court in the Radin case—I mean in the Cohn case, where Judge Holt held that there could be a crime of conspiracy even though there be no bankruptcy at all.

110 As I said yesterday, if the court pleases, the court had failed to bear in mind the unavoilable distinction in the two propositions. In that case the court cites the Reg case, where a conspiracy was sustained to commit murder as analagous to the existence of a conspiracy without there being a proceeding in bankruptcy, and the foundation of that premise is wrong because there is a statute defining murder, and a conspiracy to violate that statute is a crime, but there is no statute defining the crime to conceal goods unless there is a bankruptcy. There must be a bankruptcy and you can't avoid it.

As the court says in this case, "The concealment must be from a trustee." That is the language of the statute. There is your oxen case on your hoof, there is your Taffe case, there is your Field case,

there is your whole line of decisions, that you can not import into an act something that is not there, nor can you take something out of the act because it might suit the exigencies of any particular case before the court.

"Held, that in order that such offense might be committed there must be a trustee, and hence a specification when no trustee had been appointed that the bankrupt had concealed the property 'from his trustee in bankruptcy' was fatally defective."

111 What becomes of the so-called doctrine in the Cohn case? Why, it evaporates, if the court please. There is nothing left of it.

I call your honor's attention to the case of United States versus Britton, in 108 U. S., page 199.

"In an indictment for a conspiracy under section 5440, Revised Statutes, the conspiracy must be sufficiently charged. It can not be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

So that the so-called alleged overt acts in this indictment can not help your honor in determining whether an offense had been set forth. And incidentally, may I suggest, if your honor pleases, that the so-called overt acts are ineffectual in toto in this case because the pleader is not permitted to express his conclusion whether a certain alleged act is an overt act, but he must plead facts showing the act to be overt in character, and the facts must be so pleaded that the element of the statute, section 5440, is complied with. Section 5440 does not punish a conspiracy without an overt act, but section 5440 requires that one or more of the parties do an act to effect the object of the conspiracy, hence the act set forth must be an act of

112 such character that from the allegations of the indictment it appears that the act effects the object of the conspiracy.

Let me illustrate to your honor what I mean by that. Here we have the conclusion of the pleader that for the purpose of effecting the object of the conspiracy the defendants did the following acts. Supposing instead of setting forth the acts, as they are set forth, the pleader saw fit to say that the defendants for the purpose of effecting the object of the conspiracy, namely, to conceal goods belonging to the estate in bankruptcy, the defendants on a certain day drove an automobile to West Haven, or if you please, by way of unusual illustration, wore a red necktie, or wore a pair of patent leather boots, would an allegation of that kind show that it is an overt act of a character to effect the object of the conspiracy? Of course not.

What is the purpose of that statute, that portion of the statute requiring that an overt act be committed? The purpose of it is to enable the defendant to know what isolated act he did which tended to carry out the conspiracy.

To illustrate, if the court pleases, you will find in the so-called overt acts allegations like these: I have in mind now Estoff, who, in fact, turns out to be a truckman, and who was employed to cart goods

for Weissman, as he has for probably hundreds of thousands
113 of others. In this dragnet that was sent out he was hauled in as one of the defendants, and it is set forth that he, upon certain days, being the truckman that he is, carted goods from 178 State Street, the place of business that Weissman occupied, to Bridgeport and to Waterbury and to other places, and they call it an overt act.

They say that another defendant who had a place of business, who happens to be a man that purchased goods of Weissman and had a place of business in New York, and the pleader as a conclusion says: "To effect the object of the conspiracy this man on a certain day received certain goods in New York." Now, mark you, if the court pleases, no allegation that the goods so received, or the goods so sent, are the goods said to be concealed, or form a part of the goods said to be embraced within the conspiracy, but that he received certain goods. Now, how in the world could these defendants tell what they are charged with, so far as the alleged overt acts attributed to them? What is the purpose of setting forth the overt act? The purpose was to show that the concerted minds of the parties had met and that they had actively done something to carry out the object of the conspiracy, and hence it becomes important to set out what act
114 did they do. Now, there is not one alleged overt act set forth in this indictment which in any way pleads facts to show that such alleged act is a part of this alleged conspiracy.

In United States versus Taffe, 86 Federal Reporter, the court says: "Conclusions of law expressed by the pleader does not constitute pleading facts."

If your honor please, let me take up the subject further, upon the same subject, the necessity of pleading facts. I have already called your honor's attention to the proposition that this indictment fails to set forth that the alleged property embraced in the conspiracy was property belonging to the estate in bankruptcy, but the most liberal construction that can be given to the language of the indictment is that it is property belonging to Joseph Weissman, designated, characterized as the bankrupt. If that was the conspiracy, and conceding for the sake of argument there was such a conspiracy, there is no violation of this law.

Under section 70 of the bankruptcy act the trustee takes such property as a creditor could approach and take under legal process, and the only property that can belong to the estate in bankruptcy is property which is necessary to pay all obligations in full plus the cost of administering the estate in
115 bankruptcy, for it is only that property that the trustee in bankruptcy has a right to take, and none other. Supposing, if your honor please, A, a bankrupt, is worth $1,000,000 in property or cash, and he owes $350,000 to creditors, and the reasonable cost of administering his estate is $50,000 more, and he in all requires $500,000 to pay his obligations in full plus the cost of administra-

tion, and he leaves that amount of property for his trustee in bankruptcy. Is he guilty of any offense if he had concealed the difference between $500,000 and the amount that he had, namely, $1,000,000? The answer must of course be no, he is not guilty of any offense.

Now suppose he had conspired with others to conceal the difference between what is necessary to carry out the object and purpose of the bankruptcy act and the amount that he had, is he guilty of any violation of any law? The answer must be in the negative. And, Congress in scetion 29B said that the only property that he, A, the bankrupt, can conceal, is property which belongs to his estate in bankruptcy and not property that does not belong to his estate in bankruptcy.

Let me call your honor's attention to a case on this, 164 Federal Reporter, the case of Prescott versus Galluccio, 164 Federal Reporter, decided by the District Court of the Northern Dis-
116 trict of New York, and by the way, if the court please, this was decided by Judge Ray, who I understand was the father of the bankruptcy act, if I am correctly informed. I think Judge Ray drew the bankruptcy act.

That was a suit by a trustee in bankruptcy to recover property fraudulent conveyed. The suit was by a trustee in bankruptcy. There was a demurrer filed to the complaint that it was insufficient in law. The court in referring to the facts recites the times when the adjudication occurred and when the property was conveyed, and in passing upon the sufficiency of the indictment the court says:

"This is not a case of a preference, but subdivision E of section 70 of the act is explicit that the action may be maintained by the trustee, and the cases hold that a judgment by the creditor or trustee is not necessary. When there is no adequate consideration for the transfer, or when there is intent to cheat, defraud, hinder, or delay, the action may be maintained. It must appear that the property of the bankrupt is not sufficient to pay his creditors in full. This should be alleged and there will be an amendment accordingly. The proof is in the case and courts will not disregard the merits on a tech-
117 nicality or error in pleading when the evidence is before them."

The court in that case said that the only time the trustee in bankruptcy can recover this fraudulent conveyance is in a case when he, as trustee, has not in his hands sufficient funds with which to carry out the object and purpose of the bankruptcy act, and he directs that such an amendment be made.

The purpose of that, if the court please, is this: You must plead facts to show how the property said to be concealed belongs to the estate in bankruptcy, and the only way you can plead those facts is to set forth the required facts in substantially this way, that the obligations are so much and that the assets are so much, and then it

appears that there were facts pleaded from which the court can see that the property sought to be recovered or the property said to be concealed is property belonging to the estate in bankruptcy.

If your honor pleases, I think the gentlemen representing the Government have realized the soundness of that proposition of law when the second count of the indictment was drawn. For there they set up this very fact, on page 14, in this language:

"That on December 30, 1919, Melville Boyd, Raymond E.
118 Hackett, and David Strouse were duly appointed trustees in bankruptcy of the aforesaid bankrupt, and thereafter their bonds were given, and they qualified, and so forth, and that said Joseph Weissman, the bankrupt, had a large number of creditors, exceeding 300 in number, and having provable claims against him in bankruptcy, the amount of whose claims exceed $1,000,000 in amount, and that there was not then or thereafter sufficient assets or property belonging to said estate in bankruptcy of said bankrupt to satisfy the claims of the said creditors in full."

So when they drew the second count they realized it was important; and why was it important? Because it must always appear that the property said to be concealed is property belonging to the estate in bankruptcy, and the allegation of the pleader by way of conclusion that it belongs means nothing.

The Galluccio case that I just read to your honor, a civil suit, in which the court held such allegation is indispensable, with how much more force is that rule of law applicable in a criminal case where the accused is to be apprised with what he is charged. They have not done that. So that we have the lack of allegation in regard to the goods in question belonging to the estate in
119 bankruptcy, but an allegation of goods belonging to Joseph Weissman, described as the bankrupt, and that is certainly no violation of law. We have no allegation or facts showing that the goods in fact belonged to the estate in bankruptcy, and that is a violation of the rule of law. Now, suppose this case is tried out, if your honor pleases, and this jury for some unexplained reason arrives at a conclusion of guilty. It would be the court's duty to arrest judgment in this case because this indictment can not support a conviction so far as the first count is concerned.

If your honor please, let us take up the second count. As nearly as I can interpret the second count it is a charge that Weissman and the others bought a lot of goods for the purpose of defrauding creditors. The second count, on the very first page, that Weissman and these other defendants on divers days anticipated and planned that said Joseph Weissman, who was then doing business, should commit an act of bankruptcy. What that has to do with the criminal prosecution I can't see. There is no criminal statute making it an offense to commit an act of bankruptcy. There is a provision in the bankruptcy act that if a person commits an act of bankruptcy he might be adjudicated a bankrupt, but there is no statute making it an

offense for a person to commit an act of bankruptcy or have
120 others conspire with him to commit an act of bankruptcy. That is no crime.

Well, he is charged and the others are charged that Weissman should commit an act of bankruptcy, and he was to receive certain merchandise and remove it from the premises from where he was then conducting business, which was a part of his property or a part of Joseph Weissman's property, and the said property consisted of a large quantity of hosiery, and so forth, which was purchased with intent to defraud his creditors. That is no crime under any Federal statute. It might be a crime under the State law of obtaining goods under false pretenses, or misrepresentations, or some other kind. It is not necessary to go into that in detail. But there is no statute of the United States which makes it a crime for a person to buy goods for the purpose of defrauding his creditors. There is no such statute. There might be a statute making the use of the mails for the purpose of defrauding and obtaining goods, but that is not the case here.

Weissman can not be prosecuted for attempting to defraud his creditors in the United States court. Neither can his alleged confederates be prosecuted for helping him to do something that is not a violation of any United States law.

121 Well, we go further. First, that he was to buy the goods with intent to defraud his creditors, and that there should be an involuntary petition in bankruptcy filed in the United States District Court, and that thereafter said Joseph Weissman, doing business as aforesaid, should be adjudicated a bankrupt under the acts of Congress relating to bankruptcy, and that thereafter a trustee should be appointed in the bankruptcy proceeding. That on the 21st day of November, 1919, an involuntary petition in bankruptcy was filed against Weissman in the United States Court for the District of Connecticut, and thereafter he was adjudicated a bankrupt, on December 30th that the gentlemen mentioned were appointed trustee and qualified as such and continued to act as such, and that at the time the said Joseph Weissman was adjudicated a bankrupt—mark you, if the court please, on the 8th day of December, I think, 1919—at the time Weissman was adjudicated a bankrupt, he had a large number of creditors to whom he owed $1,000,000, and that there was not sufficient assets to pay it with, and the grand jurors aforesaid, on their oath aforesaid, do further present that said Joseph Weissman, while a bankrupt as aforesaid, under the circumstances aforesaid, on or about the 15th of January, 1920, and thereafter, within the District Court aforesaid, and within
122 the jurisdiction of the court, knowingly and fraudulently concealed from Melville Boyd and the others, duly qualified trustees, said property consisting of a large quantity of merchandise of the value of $100,000.

What is that charge, if the court pleases? At best it charges Joseph Weissman with having violated the bankruptcy act in that upon the appointment of his trustees he had concealed $100,000 worth of property belonging to his estate in bankruptcy.

Section 29 provides the crime with which Joseph Weissman can be charged if these allegations can be established, that after the appointment of a trustee Joseph Weissman had in his possession $100,000 worth of property belonging to his estate in bankruptcy.

May I again call your honor's attention to the fact that the drafter of the second count had evidently looked up some law between the time the first count was drawn and the second count was drawn, because there we have the allegation that the alleged property belonged to the estate in bankruptcy, not to Joseph Weissman, but to the estate in bankruptcy, "and the grand jurors, on their oath aforesaid, do further present that on or about the 15th day of January, 1920, the numerous defendants and divers other persons
123 who are unknown, in the district aforesaid, under the circumstances aforesaid, did knowingly and fraudulently cause, procure, aid, and abet the said Joseph Weissman, while said Joseph Weissman was a bankrupt as aforesaid, knowingly and fraudulently to conceal in the manner aforesaid from the trustees in bankruptcy said property."

Now, we reach a point, if your honor pleases, where we might say it is a little bit uncertain what they charge, whether they charge a crime to defraud creditors or whether they charge a crime under section 29B, that Joseph Weissman concealed property, or whether they charge a violation of section 332 of the Penal Code, and the section I just referred to reads as follows:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsel, commands, induces, or procures its commission is a principal."

Here we have an allegation that upon the adjudication in bankruptcy Weissman had in his possession this property, in violation of section 29B. Then we have the conclusion of the pleader that the others aided and abetted. Aided and abetted in what? "Did knowingly and fraudulently cause, procure, aid, and abet the said
124 Joseph Weissman, while the said Joseph Weissman was a bankrupt as aforesaid, knowingly and fraudulently to conceal in the manner aforesaid." No acts set forth how they aided or abetted. Presumably they intend to claim that these people remained dormant and inactive and did not do anything and did not disclose that this property was concealed, and if that is the fact we say, "What of it?" That is no crime. Aided and abetted, while said Joseph Weissman was a bankrupt, knowingly and fraudulently to conceal. Now, they are not charged with conspiracy here, and they are not charging that any of these men have the property either in their possession or subject to their control, in violation of any law, because there is no such crime.

Again, section 29B must be recognized. The concealment must be by a bankrupt who has been adjudicated as such, or after his discharge. Now, for the sake of argument, if the court please, if any of these men did conceal, or in fact had the property, it would not be a violation of section 29B because they are not the bankrupt. Your honor will recall the Field case and the Taffe case. You can not prosecute these men because they might have property. You might proceed against them under the bankruptcy act, seeking to recover property unlawfully retained or fraudulently con-
125 cealed, or transferred, or transferred without consideration, or for some other reason, so that the second count, if your honor pleases, does not charge any conspiracy, but charges one of three offenses; first, obtaining goods under false pretense from creditors and for the purpose of defrauding them, which is not a crime, or committing an act of bankruptcy, or helping Weissman to commit an act of bankruptcy, which is not a crime, or aiding and abetting Weissman—to do what? Nothing. All the allegation of the second count is that at the time of the appointment of the trustee Weissman had in his possession concealed this property, and hence no fact is pleaded showing in what manner these people aided or abetted Weissman to conceal that property, and hence no crime has been committed; and we respectfully submit to your honor this indictment is insufficient. No conviction can be sustained upon it. In conclusion let me make again this suggestion, if your honor pleases: I have personally searched the records of the Circuit Court of the United States in the Cohn case and in the Radin case, and I repeat the assertion I made to your honor yesterday that when those cases were decided the Circuit Court of the United States did not know of the decision in the case of Fox against the United States,
126 and after all is said, if the court pleases, and all that can be said upon this proposition of all these numerous questions of law involved, there is only one question which stands out prominently and which is controlling in this case. It will have to be conceded that the Federal courts have no jurisdiction over any common-law offenders, and the only offense that can be prosecuted, that any person can be prosecuted for, is an offense defined by statute and the penalty prescribed.

It is conceded under the authority in the Field case doctrine of the Supreme Court that Congress, within the constitutional provision enabling it to pass a uniform bankruptcy law has power to say what things done in contemplation of bankruptcy shall be a crime, but until Congress has so stated courts have no power to supply that legislation, and if the bankruptcy act contained the provision that any person who shall do anything in contemplation of bankruptcy shall be guilty of an offense, then other persons who might confederate and conspire with him to help him to violate that law might come in under section 5440, or section 37 of the Penal Code.

My attention is called, if your honor pleases, to the case of Gilbertson versus United States, decided by the Circuit Court
127 of Appeals in the 7th Circuit in 1909. I read from the syllabus.

"A charge against a bankrupt of concealing property belonging to the estate, from his trustee, can not be sustained without a bankruptcy adjudication, though the proof establishes a flagrant concealment of the property from the trustee de facto. 168 Federal Reporter, 672, Circuit Court of Appeals, 7th Circuit (decided nearly three years after the Cohn case)."

Now what becomes of the doctrine in the Cohn case? There is nothing left to it. And why did the Circuit Court decide that? Because they had the courage of their convictions that it was not their duty to make law. It was their duty to interpret the law. It is their duty to interpret the law just as the Supreme Court interpreted the law in the oxen case. The evils may be just as great, the the result may be just as bad, but you can not read into a statute what is not there, and if your honor pleases, of course you know that it is no novel thing for judges to accept thoughtless utterances of predecessors.

The District Court of the United States for the Northern District of New York refused to subscribe to the doctrine of the Cohn case, as not good law. The Fox case was cited in several other
128 cases and it has never been overruled, and if your honor pleases, that is the law. It is cited with approval in the Dietrich case that I gave your honor, in the case of the Senator-elect which I gave your honor, where a man was attempted to be prosecuted under a statute for taking a bribe, a Member of Congress, and the court said he was not within the statute because he was only a Senator-elect and not a Member of Congress, because that is the doctrine, if your honor please, that is the law.

It is of no importance here how bad the facts may be; it is of no importance here how much creditors might have been defrauded; the question here is, Is there a law under the United States statutes, Constitution, or treaties by which these people can be successfully prosecuted for the crime charged? And in conclusion let me attempt to impress upon your honor again what appears to me to have been the controlling element considered by the court in the Cohn case. There there was an allegation in the indictment and a finding by the court that the conspiracy was continuing in character, and that it had continued after the appointment of a trustee, and the property was concealed thereafter, and I am willing for the sake of argument to concede, if your honor pleases, that if people conspire and continue that conspiracy after the appointment of
129 a trustee there can be a violation of section 29B and come within section 37 of the Penal Code, which makes it a crime to conspire to do the very thing, namely, to conceal assets by a

bankrupt after the appointment of a trustee, or property belonging to the estate in bankruptcy.

(Recess to 1.30.)

AFTER RECESS

Mr. SLADE. For the benefit of the Government I want to make an observation in respect to two subjects. I want to call your honor's attention to two propositions that may be important to be considered. I have suggested in my argument that a motion in arrest of judgment would lie if we are correct in our propositions of law. In the case of Abrams and others against U. S. in 250 U. S., the Supreme Court of the United States lays down the rule that the question of arrest of judgment is a question of law and must be passed upon by the court.

And the other observation I want to make is this: That under the Federal statutes where a question of jurisdiction is involved the Government can by a writ of error go direct to the United States Supreme Court to have the question adjudicated without the
130 intervention of the Circuit Court of Appeals, but the defendants in the event that this case is tried, or has to be tried, would have in due course to go to the Circuit Court of Appeals because of other questions that might be involved, for review, and could only get to the United States Supreme Court by a writ of certiorari, and as I indicated already in the Radin case, the Supreme Court exercised its discretion under the act regulating writs of certiorari and refused to consider the questions involved.

I am making these observations for your consideration.

131 Mr. COHEN. In the first place, your honor, the Government at this time wishes formally to object to the filing of the motion to dismiss and quash at this time on the ground that the defendants have already filed a plea in abatement and the Government has demurred thereto, and the demurrer was sustained, whereby all the pleadings were opened, including the indictment, and since the court sustained the demurrer it sustained the sufficiency of the indictment.

In the latest edition of Foster on Federal Practice, on page 2764, in volume 3, it says: "Upon such a demurrer" (that is a demurrer to a plea in abatement) "judgment is rendered against the party who committed the first fault in pleading." There are several citations given in the note. The case of United States versus Lawrence, Federal case No. 15573, People against Crummer, 4 of Parker's Criminal Cases, New York, 217. The court will recall that the pleadings referred to were filed and the court sustained the demurrer of the Government. Therefore, the court has once already definitely ruled on the sufficiency of the indictment, and the Government objects at this time to having the matter reopened.

132 In view of the fact, however, that the court yesterday ruled that it would listen to an argument on this matter in spite

of the fact that possibly the citing from a large number of cases may become slightly tedious, the Government will cite from a number of cases to show the court that what is being asked of the court by the attorney for the defendants is nothing more nor less than that this court should overrule at least two decisions made by the Circuit Court of Appeals of this very district, made within the last ten or fifteen years, and even within the last five years, I believe, and to overrule decisions made by at least two other Circuit Courts of Appeal on this very point, all because there is a case entitled the case of United States against Fox, which came up away back in 1877, which has absolutely nothing to do with the case now in question, a case which was not even considered by the other Circuit Courts of Appeals because it had nothing to do with the subject, and so at this late hour the defendants come into court and ask that this court overturn all this law that has been so definitely and clearly laid down.

In the first place, your honor, I want to call your attention to the fact that this is, at least in the first count, a charge of conspiracy, a violation of section 37 of the Penal Code, wherein certain de-
133 fendants are charged with having conspired to commit an offense against the United States, to wit, and then we go on and we tell what the offense it. And since it is a conspiracy case, the law is that not only must the conspiracy be alleged but there must be alleged certain overt acts. May I say right here, your honor, that it has been held that in a conspiracy charge or indictment the overt act, or overt acts, charged need not be unlawful in themselves, that the acts may be lawful, but simply because they are chained or linked together with a conspiracy the whole thing becomes unlawful, but the acts themselves may be perfectly lawful.

Bearing that in mind, we come to the question of this particular case. In the case of Cohn against the United States, which case has been cited over and over again, and which is probably the basic case for the decisions along this line, we have a situation of this kind. There was a count which charged certain defendants with conspiring to commit an offense against the United States in and by corruptly and fraudulently agreeing together in anticipation of an involuntary bankruptcy, or of the involuntary bankruptcy of the American Wire & Steel Bed Company, a domestic corporation, to be brought about
and accomplished by the said Simon L. Simpson, with the
134 knowledge and connivance of the said other conspirators, to conceal from the trustee in bankruptcy of the said corporation to be thereafter appointed, certain property hereinafter mentioned, belonging to the estate in bankruptcy of the said American Wire & Steel Bed Company. It is then alleged that as a part of the scheme in conspiracy it was the purpose of the conspirators to cause the said corporation, of which Simpson was president, general manager, and majority stockholder, to commit acts of bankruptcy in order to force the filing of a petition in bankruptcy against it, and

then to make no opposition to the petition and consent to an adjudication in bankruptcy; that a petition in involuntary bankruptcy was duly filed upon the ground that the corporation was insolvent and had fraudulently concealed its property of the value of $7,000. That the defendant Simpson, as president, manager, and stockholder of the corporation, consented to the appointment of the receiver, and that at his instance the corporation was adjudged a bankrupt, and that afterwards a trustee in bankruptcy was appointed. It is further alleged that to effect the object of the said conspiracy defendant Simpson caused the removal and concealment of certain horses and wagons belonging to the corporation, that he omitted said property from the bankruptcy schedules of the said corporation, signed by him as president, and that said prop-
135 erty was never turned over to the trustee when appointed, but was concealed from him by the procurement of the defendant Simpson, with the knowledge, consent and connivance of the other conspirators. To this first count the demurrer was interposed, which was overruled by the trial judge, and the first point in the appellant's proof raised the question whether there was error in such action. Now, if the court pleases, here is a case on all fours, in spite of what my brother says on the other side; these acts were all acts that were committed prior to the petition and prior to the adjudication.

Now, then, the defendants contended that this count found no offense against the laws of the United States, first, because the defendants could not have committed the offense prohibited by the bankruptcy act, and therefore could not be found guilty of conspiracy to commit it, and second, the defendants are charged with conspiring to conceal property in contemplation of bankruptcy, which latter act is not an offense. Combining to do an act which is not criminal is not a conspiracy.

Now, there is the point raised in that case of Cohn against the United States, and as I will show the court later, every single decision that we have been able to find on this point follows implicitly the case of Cohn against the United States, and may
136 I call to the attention of the court at this time that this case came up in the Circuit Court of Appeals of the Second Circuit on November 7th, 1907, and was decided by Circuit Judge Noyes.

Now, then, what does the court say?

"The defendant's second objection is that Congress has not made it criminal to conceal property in contemplation of bankruptcy, and that the first count merely charges concealment of this character; that it alleges only the commission of acts before proceedings in bankruptcy were instituted and before a trustee was appointed. We think, however, that the indictment is not so limited in scope as claimed by the defendants. It is true that it charges the removal and concealment of certain property before the appointment of a trustee, but it further alleges that a trustee was subsequently appointed and that the property was never turned over to him, but

was concealed from him by the procurement of the defendant Simpson, with the knowledge, consent, and connivance of the other conspirators. The case presented by the indictment is, therefore, one of continued concealment, and we are not called upon to consider whether there is an omission in the bankruptcy law in respect of the disposition of property in contemplation of bankruptcy.
137 If a bankrupt conceals his property before the appointment of a trustee and continues to conceal it after the appointment, he violates the bankruptcy act, and a conspiracy that he shall do so violates the conspiracy statute. This objection to the overruling of the demurrer, like the first, is unfounded. The demurrer was properly overruled."

Now we come, your honor, to the next case, the Radin case, in 25 of the American Bankruptcy Reporter, at page 645. And, your honor, curiously enough this Radin case, which came up in April, 1911, four years after the other, also come up in the Circuit Court of Appeals of the Second Circuit, and this time the decision was written by Circuit Judge Coxe, a case of indictment for conspiracy, the same kind, on all fours with this, and here is what the court says at page 645:

"The words 'any offense against the United States,' in section 5440, have been construed to include any offense made a crime by the laws of the United States. It, therefore, makes it a crime for two or more persons to conspire that a bankrupt shall knowingly and fraudulently conceal from his trustee property belonging to his estate in bankruptcy. Of course, this conspiracy may be entered into prior to the bankruptcy. To hold otherwise would emasculate the statute and render it abortive in its application to the
138 bankruptcy act. After the bankrupt's property is in the hand of the court it would be well-nigh impossible to carry out such a conspiracy as is here shown. This court has held that the statute applies to a conspiracy formed in contemplation of bankruptcy. Cohn against the United States, C. C. A., Second Circuit. See also Alkon against the United States, C. C. A., First Circuit," which I will quote to the court in a moment. "An indictment charging such a conspiracy does not and can not contain an averment that the trustee was appointed when none has been appointed," and may I say here, your honor, I will come back to this point, but in this particular case it is even held that it is not necessary for a trustee to have been appointed. At page 649 it says this: "It is true that the precise point here in issue has not, so far as we have been informed, been passed upon," that is, in regard to whether or not it is necessary to have a trustee appointed and so to state in the indictment, "except by Judge Holt in the Cohn case, and it may be urged, strictly speaking, that what was there said was obiter. We think however, that the contention of the Government is sustained by the reasoning of the cases cited and of principles which govern the administration of the criminal law. In brief and plain language the

crime charged is conspiracy to defraud the bankrupt's credi-
139 tors by the concealing of his property so that his trustee can not reach it. When that conspiracy was entered into and the bankrupt's property was hidden and sent out of the country so that a trustee couldn't reach it the crime was consummated. We see no reason for giving to the law a construction so strained and technical as to permit the perpetrators of such an iniquity to escape."

Again, our own Circuit Court.

Now, the case of Alkon against the United States, in 163 Federal, at page 810. This time, your honor, it is a case decided by the Circuit Court of Appeals of the First Circuit by Circuit Court Judge Putnam, and this came from the District Court of Massachusetts. In that case, your honor, there was also a conspiracy to conceal assets, and here is what the court says: "The first proposition is that the indictment alleged no offense, because there was no existing bankruptcy when the conspiracy originated, while the statute, section 29 of the bankruptcy act of 1898, punishes only concealment of goods while a bankrupt, and it is said that as the alleged conspiracy related only to the doing of something which was not illegal when the conspiracy originated, the statute under which the indictment was found did not apply. That result would follow if the proposition as to the extent of the conspiracy was true, but it
140 included an intent to continue the concealment until after Barrish became a bankrupt, and it was like all conspiracies in that it related to something in futuro. The plaintiff in error cites no case in support of his position, and in common with the Circuit Court of Appeals for the Second Circuit in Cohn against the United States, 157 Federal, 651, 654, it does not occur to us that there is anything in principle or on authority which invalidates the indictment on this account."

In 1909 another case came up in Rhode Island, the case of the United States against Young and Holland, in 170 Federal Reporter, at page 111. There was another conspiracy to conceal the assets of a bankrupt. This came up in the Circuit Court for the District of Rhode Island on the 5th of May, 1909. Judge Brown wrote the opinion, and he says this: "The Circuit Court of Appeals for this circuit held in Alkon against United States, 163 Federal, 810, that the mere fact that there was no existing bankruptcy when the conspiracy originated does not make the statute inapplicable if the conspiracy included an intent to continue the concealment after the bankruptcy. The court observed it was like all conspiracies in that it related to something in futuro. The court approved and followed
as to this point the decision of the Circuit Court of Appeals of
141 the Second Circuit in Cohn against the United States, 157 Federal, 651. The indictment is apparently framed in view of the decision in Cohn against the United States, except that it charges that the Young & Holland Company corporation," and so forth.

Now, if the court please, as late as 1915, in 220 Federal, at 446, in the case of Tupack against the United States, the Third Circuit had an opportunity to express itself on this point, and there—this is in New Jersey—Judge McPherson, the circuit judge, said this:

"That other persons than a bankrupt may commit an offense by conspiring with him that he shall conceal his goods is a proposition that does not seem to need discussion in view of Cohn against United States, 157 Federal 651, and the analogous decision in Nemcoff against the United States, 202 Federal 911 (which I have here, your honor). See also United States against Holt, 236 United States 140. Indeed, we do not understand this position to be in serious dispute. The indictment is attacked mainly because it does not use the statutory words, 'knowingly and fraudulently,' in describing the crime that was the object of the conspiracy. It is undoubtedly true that section 29B of the bankruptcy act describes the crime as a knowing and fraudulent concealment, and if this indictment does not contain the fair equivalent of these words it is
142 fatally defective. Upon the other hand, although the language of the indictment might have been improved in form or arrangement, section 1025 of the Revised Statutes requires us to uphold it if the defect or imperfection did not tend to the prejudice of the defendants. Just how they have been prejudiced may be a matter of some doubt. They understood exactly with what crime the Government believed them to be charged. During eight days a trial was conducted on the theory that the offense was conspiracy to conceal goods knowingly and fraudulently, and the judge submitted the question of that offense to the jury."

So that in this court the Cohn case was also approved and followed, and this is the Third Circuit. We now have the First, Second, and Third Circuits.

Now, this Nemcoff case, Nemcoff against United States, is found in 202 Federal, at page 911. That again was of the Third Circuit in the Circuit Court of Appeals on March 7, 1913, and the same judge, Judge McPherson, held this, on page 912: "Summarized, the argument is this: The charge is conspiracy to commit a crime. The crime is concealment of assets from the trustee in bankruptcy. This offense can only be committed by the bankrupt himself, but the bankrupt is neither named as a conspirator in this particular
143 case"—they didn't even name the bankrupt as a conspirator, although the indictment clearly sets forth his participation—"nor is he included by a formal averment embracing the other persons. Therefore the defendants have been improperly convicted of conspiring to commit a crime that neither one or both of them could commit either separately or together unless they conspired with the bankrupt himself. And as a conspiracy with him is not charged in direct and precise terms the final result is said to be that the indictment failed to set out an indictable offense. We shall not attempt to follow the earnest and elaborate argument that was made on behalf

of the defendants. In our opinion it is somewhat belated, and it certainly has not satisfied us that the smallest injustice has been done. The omission complained of seems to fall fairly within the spirit of the Revised Statute, No. 1025, to be a defect or imperfection in matter of form only which shall not tend to the prejudice of a defendant. A situation much like this is discussed in Cohn against United States, 157 Federal, and we are content to concur in substance with the Court of Appeals of the Second Circuit."

In this case, your honor, the indictment did not even allege that the bankrupt conspired with the others to conceal assets, and still it was held good.

144 Now, in the case of the United States against Rhodes, 217 Federal Reporter, at page 513, also a conspiracy to conceal assets from the trustee in bankruptcy the court says this, at page 515, and, by the way, this came up in the District Court for the Seventh District of Alabama, on December 13, 1913:

"A person who conspires with another to commit an offense against the bankruptcy act is liable to prosecution. Section 29B of the act provides that a person shall be punished upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt from his trustee any of the property belonging to his estate in bankruptcy. If a bankrupt conceals his property before the appointment of a trustee and continues to conceal it after the appointment, he violates the bankruptcy act, and a conspiracy that he shall do so violates the conspiracy statute. Although the bankrupt alone can be indicted for violating the act, persons combining with him to violate it may be guilty of conspiracy. This indictment therefore is not insufficient, because it appears that one of the defendants was not the bankrupt."

The COURT. Does the indictment charge those things?

Mr. COHEN. Yes; your honor.

145 The COURT. Both of them?

Mr. COHEN. You mean both counts?

The COURT. No; both the——

Mr. COHEN. Charges that the assets were kept from the trustee in bankruptcy.

Mr. SLADE. Where, Mr. Cohen?

Mr. COHEN. I will come to the indictment in a few minutes.

The COURT. And after the appointment?

Mr. COHEN. Yes.

The COURT. Where does it say that?

Mr. COHEN. I will point that out. On the second page, your honor, about the center of the page: "And within the jurisdiction of this court, and continuously on all days thereafter up to and including the 21st day of November, 1919, under the circumstances aforesaid, anticipating, contemplating, and planning, as aforesaid, wilfully, knowingly, unlawfully, and feloniously conspire and agree together and with each other, and with divers other persons

whose names are to the grand jurors unknown, to commit an offense against the United States, in and by wilfully, knowingly, unlawfully, and feloniously conspiring together and with each other, and divers other persons whose names are to the grand jurors unknown,
146 knowingly and fraudulently to conceal, while the said Joseph Weissman should be a bankrupt as aforesaid, from the trustees in bankruptcy of the estate of the said Joseph Weissman, bankrupt, money and merchandise to the amount of $100,000, and certain other moneys and properties of divers kinds."

I call your honor's attention to the words, "To conceal while the said Joseph Weissman should be a bankrupt as aforesaid."

The COURT. Do you rely upon that as containing the allegation as referred to, as contained in that case you just read?

Mr. COHEN. Yes, your honor.

The COURT. All right. Pardon the interruption, Mr. Cohen. Proceed.

Mr. COHEN. May I at this time, while I am talking about this Rhodes case, call to your attention——

The COURT. United States against Rhodes?

Mr. COHEN. Yes; on page 516 the court says——

The COURT. What is that volume, please?

Mr. COHEN. 212 Federal. "A criminal concealment of property by a bankrupt is a continuous concealment of the property from the trustee. 'Conceal' is the secreting of assets with fraudulent intent."
147 In the case of the United States against Baker, in 243 Federal, at page 743, this case came up in the District Court of Rhode Island as late as July 26, 1917, and there Judge Brown in a conspiracy case of this kind said this:

"The first contention on demurrer is that in both counts this period is cut down by the phrase, 'In anticipation of involuntary bankruptcy,' when read in connection with the subsequent allegation that on July 7, 1913, an involuntary petition was filed."

Now, then, below it says: "It is further contended that the alleged anticipation of involuntary bankruptcy is not shown to have any basis. I am of the opinion that this is not necessary, and also that it is wholly immaterial whether they anticipated bankruptcy was to be brought about through voluntary or involuntary proceedings," and it quotes the case of Roukous against United States, 195 Federal, 883. And then down on the page, 744, it says: "On demurrer to the second count it is urged that the allegations of the ownership of the property are inconsistent. The count charges properly a conspiracy in anticipation of bankruptcy to conceal from the trustee in bankruptcy to be appointed property belonging to the estate in bankruptcy."
148 In the case of Roukous against United States, which came before the Circuit Court of Appeals of the First Circuit, on the 19th of April, 1912——

Mr. SLADE. Recorded where?

Mr. COHEN. 195 Federal Reporter, page 353. I am reading from the headnote: "Held, that an indictment for conspiracy to conceal assets in contemplation of bankruptcy was not objectionable, because there was no existing bankruptcy when the conspiracy was originated." And it quotes the case of Alkon against United States, which case I have already called to your honor's attention.

In this particularly case, your honor, the court says this: "But whether in view of any principles of the common law or of the statutes of the United States with reference to aiders and abettors, or on any possible rules of construction, the favor granted to the criminal statutes by United States against Union Supply Company can be extended to this provision of the bankruptcy statute, we are relieved from determining by other considerations relating hereto. Field against United States"—the case relied upon by my brother—"decided by the Circuit Court of Appeals for the 8th Circuit, is not in point. Cohn against United States, 157 Federal, decided by 149 the Circuit Court of Appeals for the Second Circuit, is otherwise. Indeed, the indictment in the present case seems to have been drawn from what appears in that decision almost verbatim. Following our practice with reference to prior decisions by the Circuit Courts of Appeals for other circuits, we yield to the determination in Cohn against United States. We thus conclude against the plaintiffs in error the two propositions we have stated."

Now, we have another circuit, your honor. We have the Fifth Circuit this time. The Circuit Court of Appeals of the Fifth Circuit on April 15, 1916, which subsequently refused a rehearing, or denied a rehearing, on the 20th of May, 1916, in the case of Frankfurt against United States, in 231 Federal, at page 903. I am reading from the headnote, said: "An indictment charging a conspiracy to conceal property belonging to a copartnership, which subsequently filed a voluntary petition in bankruptcy, held sufficient." And the court goes on after quoting the entire—practically the entire—indictment, to say this: "The second count sufficiently charged the four named persons, one of them being the plaintiff in error, conspired to commit the offense denounced by the bankruptcy act, 29B, against one who knowingly and fraudulently conceals while a bank- 150 rupt, or after his discharge, from a trustee, any of the property belonging to his estate in bankruptcy, and that one or more such parties did a specified act to effect the object of the conspiracy. Criminal Code, 37. That count is very similar to the indictment which was passed on in the case of Cohn against the United States, 157 Federal, with the exception that in the instant case the alleged bankrupt was a firm or partnership, while in the Cohn case the bankrupt was a corporation. All objections urged in the sufficiency of that count may be disposed of by a reference to rulings made in similar cases in which those objections have been passed on and held, and we think correctly, not to be tenable." And then it quotes Cohn against United States, Roukous against

United States, Kaufman against United States, Williamson against United States, Heike against United States, and United States against Rabinowich. This is the Fifth Circuit.

We have another one from the Third Circuit, your honor, which came before the Circuit Court of Appeals on the 2d of February, 1917, and a rehearing was denied on March 14, 1917, in the case of Knoell versus the United States, in 239 Fed., on page 16. I am reading from the headnote, paragraph 4:

"Those conspiring, before a petition in bankruptcy was
151 filed, to receive the property of the bankrupt with intent to defeat the bankruptcy act, under an agreement which contemplated further action after the petition was filed, may be convicted of conspiracy to receive the property after bankruptcy."

Paragraph 3 says:

"Defendants may be convicted of conspiring to receive the property from a bankrupt after bankruptcy with intent to defeat the bankruptcy act, though the evidence shows that the property was taken out of the bankrupt's possession two days before the petition in bankruptcy was filed, since the final agreement may not have been made until thereafter, and the property continued to be the property of the bankrupt."

And in the course of the case the court goes so far as to say:

"The facts may be true, but the conclusion does not necessarily follow. The argument apparently does not consider that the offense charged is not the actual receiving, but the conspiring to receive."

And they say, further down: "Certainly the conspirators would find it easier to receive and convert the goods if these were first put out of the court's reach, whose receiver would immediately seize whatever might be found on the bankrupt's premises."

152 That is one case, your honor, which is very, very important, and is one of the latest cases. It is the case of Glass against the United States of America. That case came before the United States Circuit Court of Appeals for the Third District in March, 1916. It is found in volume 36 of the American Bankruptcy Reports, page 550. In this case, when your honor reads it, you will find that a great many of the objections raised by counsel for the defendants are answered, because in that case most of these points were raised. This was decided by Circuit Judge Wooley, and he says, on page 551, this: "The trial court admitted testimony touching the conduct of the defendant in removing his books and in disposing of his goods during a brief period immediately prior to the date of the bankruptcy upon the ground that such testimony had a probative bearing upon their subsequent disappearance. Much of this testimony consisted of statements made by the defendant to his creditors and acts done by him and his agents in secreting his books and in removing merchandise from place to place before bankruptcy proceedings were instituted. The defendant complains that in admitting this testimony the court erred, because from its very nature the

offense of concealing property from a trustee can only be committed after bankruptcy proceedings have been instituted and a trustee appointed. Therefore the evidence of prior conduct was rele-
153 vant. The defendant urges this contention upon the theory that concealment within the meaning of the act must at all times be a physical act in the nature of manual conversion begun and completed after bankruptcy, and therefore to be proved only by acts done after bankruptcy.

"This contention is without merit. The testimony was admitted, as stated by the court, not in proof of the completed act of concealment and fraudulent intent to conceal might reasonably be drawn. 'Conceal' is defined by the act to include 'secrete,' 'falsify,' and 'mutilate' (section 1, clause 22), and by concealment of property the act contemplates a continuous concealment in instances where property is physically converted and concealed before bankruptcy, and remains secreted and concealed after bankruptcy." (Then they cite several cases.)

"As evidence of acts committed before bankruptcy is admissible in proof of concealment then begun and thereafter completed, so evidence of acts before bankruptcy is admissible in proof of fraudulent intent with which concealment is completed after bankruptcy.

"The construction of continuous concealment has been declared by the courts principally in cases arising on application for discharge, under section 14B of the act; 2 of Loveland on Bankruptcy,
154 section 651, and the cases cited.

"The construction applies with equal force to concealment of property under criminal section 29B. Each section deals with the same thing, though in different ways, and with different objects. The main difference in the provisions is in the proofs required in proceeding under them, and this is the difference that always maintains between proof required in civil and criminal actions. We find no error in the court's rulings reviewed under the third, 7th, 8th, 9th, and 10th assignments of error."

And yet, your honor, my learned brother yesterday said, "There is no such offense in the United States as set forth in this indictment, because of the allegation that it is done in contemplation of bankruptcy." I read, on page F10, "With all due respect to the Circuit Court of Appeals."

As a matter of fact, your honor, I think it is almost a waste of time to consider at this time that Fox case, but in view of the great stress laid upon that by the attorney for the defense I want to call to the attention of the court this. No one disputes the law laid down in the Fox case, 95 U. S. 670.

In the Fox case what happens? In the first place, that case came up under the old bankruptcy law, the old law of 1867. There
155 a man was being prosecuted, was charged with having within three months of the time he became a bankrupt procured property upon false statements as to credit, and the court said very

properly, of course, "The mere fact that a man goes out and gets property upon credit, and on making false representations, does not mean of itself that he intended to go into bankruptcy fraudulently, or to have some one else put him into bankruptcy fraudulently." In other words, they said, while this particular act may be a crime against the State in which he lives, because he is obtaining money under false pretenses, or something of that nature, since there is no law of the United States which makes that particular act a crime, and since we can not find any intent in connection with this particular act to violate any law of the United States, there is no crime. But how different that case is from this one, your honor.

In the first place, may I come back to what I said earlier, that in the cast of a conspiracy, the overt acts themselves need not be unlawful. The overt acts may be perfectly lawful. I mean, you take in our indictment, we say that a certain man received from J. Weissman a check for a certain number of dollars. Now that act in and of itself, the receiving of the check is not unlawful, but just because overt acts themselves are not unlawful does not mean that
156 when you take a whole group of them together and you show a conspiracy, that then all those people who performed these overt acts can not be charged with a conspiracy. It does not show that at all.

Now, here is the point. Had the overt act that is charged in United States versus Fox, had that been, or an act of that nature been one of our overt acts, it would certainly hold water because it can be lawful in itself and still be an overt act, but in that particular case, in order to have it hold water it must be an unlawful act, and the court held that there was no law of the United States which made that particular act a crime.

They said: "If Congress wants to say that anybody who receives money on credit by making false pretenses or false statements, in contemplation of bankruptcy, Congress can put that in," but they have not put it in, and therefore we said "we wont charge it," but this is a different case. Here we are charging a man with conspiracy.

Then there is another point, your honor. As I have shown your honor from the decisions, the crime charged in 29B, the concealment is a continuous action, a continuous act. It starts way back at the time the conspiracy is made, and it continues until long after the man is adjudicated a bankrupt.

157 When a man, then, commits any act to violate 29B, which has in it the word "conceal," why then you have a conspiracy to violate 29B, and that is what we claim. This case, U. S. versus Fox, has nothing to do with it at all.

I call your honor's attention to the section of the bankruptcy act of 1867, which says, "Or shall within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business, and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels

with intent to defraud * * *." But in this particular case, your honor, the court says we can not tell. The man had a perfect right as far as the bankruptcy act is concerned, the man had a perfect right to go ahead and obtain various goods, because we can not show that there was an intent there to violate the bankruptcy act.

But there you have a substantive offense. Here we have a conspiracy. And again I must say that overt acts in a conspiracy need not of themselves be unlawful.

As a matter of fact, your honor, my friend has given you a number of examples. One case that he relies on in regard to a Senator-elect receiving a bribe, and the court held that because he had not yet become a Senator he
158 could not commit the crime of receiving property while a Senator, or receiving a bribe while a Senator. That is absolutely correct. But, your honor, there would have been absolutely nothing to stop those people from getting together and forming a conspiracy to give a bribe to this man when he became a Senator.

Mr. SLADE. Mr. Cohen, you misconceive that case. That man was charged with conspiracy.

Mr. COHEN. I have not misconceived, Mr. Slade. A man was charged with conspiracy to give the Senator-elect money before he was a Senator. Had they charged him, or had the conspiracy been to give him money while a Senator, it would have been a criminal conspiracy, even if he were not to become a Senator for two years. There is just the difference.

As a matter of fact, your honor, in that same bankruptcy act of 1867, section 29, one of the paragraphs says:

"Or if he has in contemplation, or become a bankrupt," showing distinctly and directly that Congress at that time did not intend that this particular act should be considered a crime under the laws of the United States, because in other sections they used it. In this particular section they left it out, and that is why the court in
159 the case of the United States against Fox says this:

"It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy, but it does not say so, and we can not supply the qualifications which the legislature has failed to express."

In another place in the case of the United States against Fox they say:

"Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offense against the United States, but an act committed within a State, whether for a good or bad purpose, or whether with an honest or a criminal intent, can not be made an offense against the United States unless it has some relation to the execution of the power of Congress, or to some other matter within

the jurisdiction of the United States. An act not having any such relation is one in respect of which the State alone can legislate."

And we maintain that law is absolutely sound.

In the case of Meyer against the United States, a very late case, in 43 American Bankruptcy Reports, page 692, this matter
160 came before the United States Circuit Court of Appeals for the 7th Circuit, in March, 1919. Circuit Judge Baker of the very circuit, your honor, that counsel on the other side claims is opposed to us, says as follows:

"One line of objections is based on the failure of the indictment to charge that the conspiracy included an intention on the part of the plaintiffs in error to be thrown into bankruptcy and have a trustee appointed, or to charge that at the time of the bankruptcy proceedings were pending and that a trustee had been appointed. These objections proceed on the erroneous theory that insolvent debtors can not properly be convicted of a conspiracy to hide their property so that their creditors can not reach it through bankruptcy proceedings which the debtors are expecting to be instituted."

So we have the 7th Circuit with us also.

I said a little while ago, your honor, that it has even been held that it is not necessary to have a trustee appointed, and in the Radin case, at page 646, the court says this:

"If the contention of the defendant be correct, we have the strange anomaly of defendants who have entered into a conspiracy to enable the bankrupt to conceal his property and who have succeeded so completely that not a vestige of his property re-
161 mains going scot free, and other defendants who have entered into an identical conspiracy being imprisoned for the reason that they failed to conceal the bankrupt's entire property, thus making the appointment of a trustee necessary. The Government is not seeking to punish Feinberg for concealing while a bankrupt property belonging to his estate from his trustee, but is seeking to punish the defendants for conspiring that he should conceal his property from his trustee and thereby defraud his creditors. This question was decided in accordance with the contention of the Government in United States against Cohn."

In the case of United States against Fried, 25 American Bankruptcy Reports, at page 89, the court said, after quoting—and this, by the way, is Judge Learned Hand, again the Second Circuit, April, 1910. Judge Hand said this, after quoting the Cohn case, and the Young & Holland Company:

"Those were cases of conspiracy, but if one may be guilty of conspiring to commit an act, it can not be that he is not guilty if the conspiracy is accomplished. I do not regard Field against the United States, of the 8th Circuit, 14 American Bankruptcy Reports, 507, as binding after Cohn against the United States mentioned above."

In other words, here is Judge Hand quite distinctly and
162 openly overruling the case upon which counsel on the other side bases the great part of his argument, namely, the Field case. And furthermore, if the court will notice the language, he says:

"I do not regard the Field case against the United States as binding after Cohn against the United States."

And the same view, I believe, was taken by the court in the case of Kaufman versus United States, in 32 American Bankruptcy Reports, page 22. This decision was written in March, 1914, in the Second Circuit, Circuit Court of Appeals, by none other than Judge Rogers. This was a conspiracy. In this particular case the same question is raised as in the Field case.

The court said: "But in Cohn against United States, 157 Federal 651, this court decided that a bankrupt corporation was capable of committing the criminal offense of knowingly or fraudulently concealing its property from its trustee, defined and made punishable by the bankruptcy act, and that persons who conspire to cause a corporation to commit such an offense are indictable for the conspiracy, and that it is immaterial that the corporation is not or can not be indicted as one of the conspirators. We know of no reason why we should not adhere to the opinion we then expressed. We
are compelled, therefore, to disregard the defendant's conten-
163 tion that if the corporation could not be convicted of the offense described in section 29B of the bankruptcy act he could not be convicted of aiding and abetting in the commission of such offense."

And this, by the way, covers our second count.

"There is no distinction in principle between the Cohn case above and the case at bar. The fact that in the Cohn case the indictment was for conspiracy, under section 5440 of the Revised Statutes, while in this case the indictment is based on a concealment of assets, is a distinction without a difference in so far as the principle involved is concerned. It may be conceded that defendants could not be convicted under section 29B of the bankruptcy act. That section applies only to one who has knowingly or fraudulently concealed while a bankrupt or after his discharge. As the defendant is not alleged ever to have been a bankrupt, this section is without application to him. It was held in Field against United States, 137 Fed. 6, that the present and past bankruptcy of the person accused was an indispensable element of the offense created by that section. The defendant, however, is mistaken in supposing that the principle announced
in the Field case is so far applicable to his case as to require
164 this court to set aside his conviction. He loses sight of the fact that his own conviction is not under section 29B of the bankruptcy act, which was under discussion in the Field case, but is under section 332 of the Criminal Code."

And may I say again, your honor, that in that Field case the man that was indicted was indicted for the substantive offense under 29B, not under this conspiracy act or section, and therefore there was a difference. In that case the court said that there must be—in order to convict that man, he must be one that is a bankrupt, either present or past.

Now, there was a question raised as to the completion of a conspiracy, and in 258 Federal Reporter, at page 830, the case of Mine Workers of America against the Coronado Coal Company, it was held, "If unlawful acts were in pursuance of a conspiracy, and were committed before the conspiracy had been abandoned or its object accomplished, all persons who were members of the conspiracy, or made themselves parties thereto at any time before it had been abandoned or its object completed are responsible."

In other words, your honor, we practically get to this point: We have shown you that it is not necessary to include a statement that the bankrupt himself conspired with others to conceal assets
165 in bankruptcy; we eliminate him. We have shown you a case in which the court in this circuit held that it is not even necessary that a trustee should have been appointed, and here we have a case which says that it is not even necessary that the bankruptcy should have been gone through with.

"If unlawful acts were in pursuance of a conspiracy and were committed before the conspiracy had been abandoned or its object accomplished, all persons who were members of the conspiracy or who made themselves parties thereto at any time before it had been abandoned or its object completed, are responsible."

Just one other word I want to say about this concealment. I call to the court's attention the fact that the plain, ordinary understanding of the crime as charged under 29B, "concealment," would show that in the ordinary course of events a bankrupt would necessarily have to conceal before the trustee is appointed, because as soon as the trustee is appointed he takes possession, and how can he get at these goods after they are taken possession of? Necessarily it is intended that the concealment should take place before the actual appointment of the trustee.

May I cite to the court on this point that it is unnecessary
166 to aver that the conspiracy succeeded? The Curly case, in 180 Federal Reporter, at page 1; the McKinley case, 126 Federal Reporter, 242; the Green case, 150 Federal Reporter, 343; the Williamson case, 207 Federal Reporter, 425; or that the consummation is possible. That need not be alleged or averred; 164 Federal Reporter, 524, and 150 Federal Reporter, 208.

Now the question comes up as to whether or not there had been a crime charged, because it is said that all these defendants, as well as Weissman, or with Weissman, conspired to conceal property from the trustees in bankruptcy. And the argument is made that the only one that can conceal assets from a trustee in bankruptcy and have it

a crime under 29B is a bankrupt. Now, in one of the cases, in the case that I have already cited, the case of United States against Rhodes, 212 Federal Reporter, page 153, this very question was raised. On page 515 the court says this:

"One of the grounds of the demurrer is that the indictment does not allege or show that these three defendants conspired to aid the bankrupts to commit this offense, but charges in effect that all three were guilty of a conspiracy to commit the offense, and that Calvin J. Rhodes, not being a bankrupt, could not conspire to commit
167 an act, an offense which, under the bankruptcy law, only a bankrupt could be guilty of committing. A person who conspires with another to commit an offense against the bankruptcy act is liable to prosecution. Section 29B of the act provides that a person shall be punished upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt from his trustee any of the property belonging to his estate in bankruptcy. If a bankrupt conceals his property before the appointment of a trustee and continues to conceal it after the appointment, he violates the bankruptcy act, and a conspiracy that he shall do so violates the conspiracy statute. Although the bankrupt alone can be indicted for violating the act, persons combining with him to violate it may be guilty of conspiracy. The indictment, therefore, is not insufficient because it appears that one of the defendants was not a bankrupt."

That is exactly in answer to the argument raised on the other side.

As a matter of fact, your honor, there are several other things mentioned. The court well knows that an adjudication of bankruptcy dates back to the date of the petition. The court also knows that under our indictment the fact that we have charged va-
168 rious acts as occurring, even after the date of the petition, but, before the date of the adjudication, makes no difference, because those were all overt acts which were committed pursuant to the conspiracy which we claim had already been formed, and we do not care whether they happened before the petition was filed or before the adjudication was filed or before the appointment of a trustee. All that we care about is that we have alleged that a conspiracy was formed, and that later, pursuant to said conspiracy, and to further, to effect the conspiracy, certain overt acts were committed.

As far as those overt acts are concerned, your honor, the question has been raised as to what these overt acts should be. In the case of United States against Baker, 243 Federal Reporter, 743, the court said this:

"Only one overt act is essential to the statutory offense, and if one overt act is sufficiently charged, this ground of demurrer to the whole count can not be sustained whatever may be the deficiencies in other charges of overt acts."

Your honor, we claim that all we have to do is to set forth the conspiracy, and thereafter to show but one overt act on the part of any one of the alleged conspirators. As a matter of fact, we have shown a great many, and I want to impress upon the court
169 again that the important thing is that these overt acts shall have occurred after the formation of the conspiracy, and, further, that these overt acts need not of themselves be unlawful.

Now, your honor, there has been a question raised as to the statement in the indictment about the property being part of the property of the bankrupt estate. In the first place, if the court will look on page 2, the indictment reads as follows:

"That all these defendants did on or about the 1st day of April, 1919, in the city of New Haven aforesaid, and within the jurisdiction of this court, and continuously on all days thereafter, up to and including the 21st day of November, 1919, under the circumstances aforesaid, anticipating, contemplating, and planning as aforesaid, wilfully, knowingly, unlawfully, and feloniously conspire and agree together and with each other, and with divers other persons whose names are to the grand jurors unknown, to commit an offense against the United States in and by wilfully, knowingly, unlawfully, and feloniously conspiring together and with each other, and divers other persons, whose names are to the grand jurors unknown" (and this is the important part, your honor), "knowingly and fraudulently to conceal, while the said Joseph Weissman should be a bankrupt as aforesaid, from the trustees in bankruptcy of
170 the estate of the said Joseph Weissman, bankrupt, money and merchandise to the amount of $100,000, and certain other moneys and properties of divers kinds, the amount, quality, kind, or more particular description of which are to the grand jurors unknown."

Your honor, "of the estate of the said Joseph Weissman, bankrupt, money and merchandise to the amount of $100,000 * * *." Well, if that does not state that these goods were of the bankrupt estate of Joseph Weissman I do not know how else we could say it and make it any clearer. But, as a matter of fact, your honor, in Collier on Bankruptcy, 12th edition, 1921, volume 1, on page 623, it says:

"An indictment charging that defendant unlawfully, knowingly, wilfully, and fraudulently concealed from his trustee certain property carries with it a sufficient averment that the defendant knew that said property belonged to his estate in bankruptcy," so that even if there were any question, even if there were any question about the language, which we can not see, and which we do not concede, that section in Collier would remove it. There are certain cases quoted in the note.

Now, your honor, before I leave this matter of the first count, and, by the way, in answer to the argument as to whether or not
171 the property that was in his possession was property belonging to the bankrupt estate, that is a matter for the jury, your

honor. It is up to the jury to say whether or not that property, all that is charged by the Government, was property belonging to the bankrupt estate. If the jury find that it did not belong to the bankruptcy estate, why, then, they will return a certain verdict. If, on the other hand, they find that it did belong, why, their verdict will probably be a different one.

As a matter of fact, section 1025 of the Revised Statutes provides: "That no indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall trial, judgment, or other proceedings thereon be effected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

And in one of the cases it says: "The approved practice in the courts of the United States is to discourage the rasing of mere procedure questions by demurrers to indictments by reason of formal defects or otherwise. This discouragement extends to raising by demurrer questions which might as well or better be raised as trial questions. R. S. 1025 is a command to ignore all defects in
172 pleadings except such as tend to the prejudice of the defendant. U. S. against Werner, 247 Fed. 208; U. S. against Howard, 132 Fed. 325; and a number of others."

And finally, in conclusion, the court should note the concise statement of the law in the case of Davy versus U. S., 208 Federal 237. "The function of an indictment is performed when it announces a substantial accusation of crime, state facts sufficiently in law to support a conviction, and furnishes the accused with such a description of the charge as will enable him to make his defense, and avail himself of conviction or acquittal as protection against further prosecution for the same offense."

That concludes what we have to say as regards the first count. As regards the second count there is very little to be said. I will call to the court's attention the fact that the second count is not a conspiracy count or that the second count is brought under the law of the United States which makes every person who aids or abets a principal.

The second count of the indictment alleges that the bankrupt and various other persons named as conspirators with the bankrupt conspired in anticipation of bankruptcy with the bankrupt to purchase large quantities of merchandise, thereafter to remove
173 and conceal the same from the trustee in bankruptcy, thereafter to be elected. The indictment alleges the various steps of the bankruptcy proceedings leading up to the appointment of the trustees, and that there were not sufficient assets in the hands of the trustees to satisfy the claims of creditors. It sets out the concealment by Weissman of certain merchandise, and then concludes by alleging that the defendants aided and abetted the bankrupt, and to knowingly and fraudulently conceal the aforesaid property from the trustees in bankruptcy herein.

This indictment in form is substantially the same as the much-cited authority of Cohn versus U. S., where the court said:

"We think, however, the indictment is not so limited in scope as claimed by the defendants. It is true that it charges the removal and concealment of certain property before the appointment of a trustee, but it further alleges that a trustee was subsequently appointed, and that the property was never turned over to him, but was concealed from him by the procurement of the defendant Simpson, with the knowledge, consent, and connivance of the other conspirators. The case presented by the indictment is therefore one of continued concealment, and we are not called upon to con-
174 sider whether there is an omission in the bankruptcy law in respect of the disposition of property in contemplation of bankruptcy, and if a bankrupt conceals his property before the appointment of a trustee, and continues to conceal it after the appointment, he violates the bankruptcy act, and a conspiracy that he do so violates the conspiracy statute. This objection to the overruling of the demurrer, like the first, is unfounded. The demurrer was properly overruled."

I want to call the attention of the court under the aiding and abetting statute, where these aiders and abettors are all considered as principals, it is not necessary as under a conspiracy indictment to set out overt acts; I mean, it becomes a substantive offense, a substantive crime in itself.

In conclusion, then, your honor, may I say to the court that if the court should be willing to apply to this case the case of Fox against the United States, which we claim had absolutely nothing to do with this, it would have to upturn, overturn, and upset decisions absolutely in point, made in at least four different Circuit Courts of Appeals, made within the last fifteen or twenty years, whereas this Fox case is probably nearly fifty years old. It would have to disregard rulings made by the Circuit Court of
175 Appeals of this very circuit, and would have to say that our Circuit Court of Appeals in its two or three decisions which it has handed down on this particular point was absolutely wrong.

We are willing to stand by the decision of the Circuit Court of Appeals in the Cohn case and in the other cases decided since.

We respectfully submit to the court that the motion of the defendants be denied.

Mr. SLADE. Will your honor grant me five minutes' time?

The COURT. Yes.

Mr. SLADE. I have listened with considerable interest to the cases cited by the gentlemen, and your honor will find upon examination of all those cases that the doctrine that I advocated was the doctrine that all those cases followed are based upon the Cohn case, an allegation of continuous concealment of the property, after the appointment of a trustee, and impliedly, and justly so, the court said

there was a conspiracy. The trouble with the gentlemen is, if your honor pleases, that they do not read their cases, they do not analyze them. Take that Cohn case that they referred to, in 195 Federal Reporter, page 15, the Roukous case. Your honor will find
176 there that the court, Judge Putnam, in passing upon the proposition of the legal sufficiency of the indictment, specifically holds that there is an allegation in the indictment that the conspiracy concealment is continuous, and that after the trustee was appointed they still continued to conceal.

177 There is no such allegation here. Take the Cohn case that the gentleman laid so much stress on, and listen to what the court says there:

"It is further alleged that to effect the object of such conspiracy the defendant Simpson caused the removal and concealment of certain horses and wagons belonging to the corporation, that he omitted said property from the bankruptcy schedule of said corporation signed by him as president, and that said property was never turned over to the trustee when appointed, but was concealed from him by the procurement of the defendant Simpson."

That is what I have been contending for, if your honor pleases. Now, what does this indictment say? It says that they conspired for Weissman to conceal and that the conspiracy commenced on the 1st of April and ended on the 21st day of November, one month before the receiver was appointed, and there they stop. So far as this indictment is concerned, the property may have been turned over to the trustee, from a legal standpoint.

In the Cohn case the court, in passing upon the question of the indictment, says:

"It is true that it charges the removal and concealment of certain property before the appointment of a trustee, but it further alleges that the trustee was subsequently appointed and that the prop-
178 erty was never turned over to him, but was concealed from him by the procurement of the defendant Simpson, with the knowledge, consent, and connivance of the other defendants."

How does that meet any of the propositions we have advocated, if the court pleases? The trouble is these gentlemen want to put into this indictment something that is not there, namely, that the conspiracy was continuous and became effectual upon the filing of the petition in bankruptcy, and that such concealment continued thereafter in pursuance to the original conspiracy.

So, if the court pleases, if you will examine the case of the Holland Company, you will find there the finding to be that there was an allegation of continuous concealment as a result of a conspiracy said to have originated prior to the bankruptcy, but continued subsequent to the bankruptcy, and in fairness to the gentlemen I have suggested in my argument that under these circumstances legally it may be said that the conspiracy was formed after the trustee was appointed, and continued to be such conspiracy, and to that I say, amen. That does not meet the proposition.

Now, in regard to the second count, I am very glad that the district attorney finally admitted that it is not an allegation of con-
179 spiracy, but he says it is a prosecution under section 332. I will ask your honor to examine that second count. What do you find there? The concealment had occurred prior to the bankruptcy and existed at the time of the appointment of the trustee. Now, how in the world is it possible for these defendants to have committed the crime under section 332 after the appointment of the trustee? He had already had the property, he had already taken it, he had possession of it, and continued, and the Government says still has it. Now, I have cited to your honor the case—passiveness, merely laying by and saying nothing, constitutes no crime.

One more word, if the court pleases. The application of the doctrine in the Fox case—I go back to the proposition I have urged before. Your honor is confronted with the obiter dicta in the Cohn case and in the Matthews case, for which there is not a single citation, and the expression of the court in the Matthews case is very significant. They practically say, "Well, never mind what the law is, we are going to say so-and-so." You take the Fox case and you will find this doctrine to be unavoidable.

Congress, says the Supreme Court, may, under the Constitution, pass a law in aid of the enforcement of a bankruptcy law, but if it intends any independent acts to be effectual and give the court jurisdiction, it must say: "Any act done in contemplation of
180 bankruptcy shall be a crime," and that they have not said. And I repeat what I said before: Your honor is confronted with a proposition. Will you take the assumption of the doctrine of the United States Supreme Court as the law, or will you take the doctrine in the Radin case as the law? Now, that is plain. I do not ask your honor to enunciate the law. With all due respect to the Circuit Court of Appeals, judges are not infallible. If they had seen the Fox case they would have said, "We are bound by the decision of the Supreme Court of the United States."

Now, my learned friend says the doctrine in the Fox case has nothing to do with it. Now, let me illustrate, if the court please, with how much more force the doctrine in the Fox case must be recognized in this case than it should have been recognized in the Fox case. Here we have no provision at all in our bankruptcy act that any act done within four months prior to adjudication in bankruptcy shall be a crime, and yet the Government comes in and says, "Oh, yes; that must be so; that is the law, because the Circuit Court has said so." In the Fox case the bankruptcy act of 1867 specifically provided that any person who shall, within the period of four months, under the pretense of buying goods in the ordinary course of business, buy goods with no intention to pay for
181 them, shall be guilty of a crime. There we had that provision, and yet the Supreme Court said it was ineffectual and not good because Congress did not say that if these things are done

in contemplation of bankruptcy we have no right to say so; but the Government now says that even though Congress did not say whatever you might do prior to the adjudication in bankruptcy, in contemplation of bankruptcy, is nevertheless a crime. Why, your honor has got to overrule the doctrine in the Fox case, and I respectfully submit that your honor can not do that until the Supreme Court itself first overrules the doctrine there laid down. That is the law, no matter how ridiculous the result might be, no matter how dangerous and how abhorrent the doctrine may be. Our Government is divided into various departments. It is for Congress to make the law and for the court to interpret it and enforce it.

The COURT. This case will be adjourned until Monday, March 13, at 10.30 a. m.

(Whereupon an adjournment was taken to Monday, March 13, 1922, at 10.30 a. m.)

182 UNITED STATES VS. JOSEPH WEISSMAN ET AL.

NEW HAVEN, CONNECTICUT,
Monday, March 13, 1922.

Before Hon. Edwin S. Thomas, J., and a jury.

Trial continued

Same appearances.

(Roll call of jurors.)

The COURT. In view of the conflict of authority cited by both sides to this controversy, and further in view of the great importance of this case, I deem it wise neither to grant nor deny the motion to dismiss but rather to certify, under the laws of the United States, the questions presented to the Supreme Court of the United States for the decision and determination of that tribunal.

This decision is reached after a careful consideration of the vital questions presented by the motion in the hope that the uncertainty and confusion in the decisions of the District Courts and the different Circuit Courts of Appeals may be finally set at rest, and this may be done in a short time as under the law of the United States such cases take precedence over all other matters before the Supreme Court and a decision may speedily be reached.

183 The effect of this ruling is only to hold in abeyance the trial for a comparatively short time the continuation of which at this time will only result in the expenditure of a vast amount of time and money with these important questions still uncertain and which doubtless will be renewed in the event of conviction even then leaving the matter in confusion and doubt.

The questions of jurisdiction and other questions raised by the motion will be properly certified, and when answered by the Supreme Court the case will be resumed. The trial is accordingly adjourned for all purposes until such decision.

Gentlemen of the jury, as you have been sworn in this case and as you have just understood that the case is continued, I am bound to caution you again not to talk about this case even among yourselves or with anyone else, or to read any articles in the newspapers concerning it, and I will ask you please to heed carefully the suggestion I make.

At the proper time, and as soon as possible, I will ask counsel to get together and certify the questions here presented, prepare them so that you may later present them.

Adjourned.

184 UNITED STATES OF AMERICA VS. JOSEPH WEISSMAN et al.

Before Hon. Edwin S. Thomas, J., and a jury.

NEW HAVEN, CONNECTICUT,
Monday, May 8th, 1922—11.45 a. m.

Appearances: Same as before.

The COURT. Call the roll of the jury, Mr. Clerk.

(Jury polled; all present.)

The COURT. I understand one of these defendants has been summoned before the grand jury in New York.

Mr. SLADE. Yes, your honor; Morris Renkoff sent a letter in this morning enclosing a subpœna from the grand jury, of New York, and presenting that as the reason why he could not be here this morning. So I immediately placed myself in touch with the United States district attorney's office, and he was paged, finally got him on the telephone, and we made him realize that this engagement here takes precedence to any obligation under the State process. The district attorney, of New York, assured me that he would take a twelve o'clock train and be here. I have the letter here and the subpœna, if your honor cares to look at them [papers handed to court].

Of course, it is due, if the court pleases, to lack of knowledge
185 on the part of this defendant to appreciate that this takes precedence over any obligation under a subpœna.

The COURT. Of course, he wouldn't know.

Mr. SLADE. Well, he could have taken counsel.

The COURT. The subpœna tells him if he is not there he would be arrested, so he probably thought that was more important than this, since he was under arrest here anyway.

Mr. O'KEEFE. There is one other defendant, Louis Turner, who is not here. There is some misunderstanding about it; I sent him a registered letter May the 4th, and one of the accused advised me I could get in touch with him over the telephone. I had no telephone address.

The COURT. Where does he live?

Mr. O'KEEFE. At New York City. I think it must be a misunderstanding, because he has always come when I have notified him at

this particular address, so I think between now and two o'clock I will have an opportunity to reach him on the telephone.

The COURT. We will take a recess until two o'clock.

(Recess until 2 o'clock p. m.)

186 AFTER RECESS

(Court convened at 4 p. m.)

Appearances: Same as before.

The COURT: Call the roll of the jury, Mr. Clerk.

(Jury polled; all present.)

The COURT. Call the roll of defendants.

Joseph Weissman: Present.

Jacob Anschelowitz: Present.

Aaron H. Weissman: Present.

Morris Nalitzky: Present.

Louis Wolfe: Present.

Morris Renkoff: Present.

Maurice L. Estoff: Present.

Nathan Witkin: Present.

Louis Turner: Present.

Morris Lebov: Present.

Louis Kaplan: Present.

Samuel Falck: Present.

Eli Cohen: Present.

Louis Hertzberg: Present.

Barney Wilson: Present.

The CLERK. I think that is all.

The COURT. All present?

187 The CLERK. Have I omitted any name?

Mr. SLADE. No.

The COURT. You may be seated, gentlemen.

Gentlemen of the jury, when you were here before to consider this case upon the motion of the defendants that the court dismiss the indictments, counsel for the defendants and the Government presented arguments covering the questions then raised. These arguments were both lengthy and searching as to the law and facts, in so far as they were set forth in the indictment. Much time was spent in the research of the law applicable to the legal questions raised by the motion. The court considered the claims made on both sides and decided that the questions involved, in view of the conflict of authority, should be presented to the highest tribunal in our judicial system for its determination, the Supreme Court of the United States, but after consideration of this whole subject I decided that such procedure was not in accordance with the rules of practice, and therefore concluded that the course suggested by me could not be followed.

Subsequently the defendants withdrew the motion to dismiss.

188 This leaves the case ready for trial, just as it was before the arguments referred to were made, but in view of all the facts

and the law submitted to the court and the court concluding, as it does, that the indictment is invalid, because no offense is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty, and that will dispose of the case for your purpose.

You may retire.

(Jury retired.)

Mr. COHEN. If the court please, may the Government at this time take exception to this ruling on the part of the court?

The COURT. It ought to be on the record, certainly.

(Jury returned.)

(Jury polled; all present.)

The CLERK. Gentlemen of the jury, have you finished your deliberations?

Mr. COHEN. Just an instant, Mr. Pickett.

If the court please, the Government at this time rises to object to the handing in of any verdict by the jury because nothing
189 has been submitted to the jury in the way of evidence, and also object to the direction of a verdict by the court.

The COURT. Exception noted; proceed.

The CLERK. Have you finished your deliberations and ready to make a report in accordance with the direction of the court?

The FOREMAN. We have.

The CLERK. What is your report?

The FOREMAN. Not guilty.

The COURT. You may be seated, gentlemen. Of course, it is apparent to you all, as I have indicated, this involves purely questions of law, and with this you are discharged from further service in this case. You may report to the marshal and he will arrange with you about the payment of your fees. You may now retire; there will be no further business for you of any kind.

190 In United States District Court

[Title omitted.]

Order approving proceedings

The foregoing transcript of proceedings is hereby approved and made a part of the record on writ of error in the above entitled matter.

EDWIN S. THOMAS,
United States District Judge.

191 In United States District Court

[Title omitted.]

Motion re transcript of record

Filed May 22, 1923

The United States of America, plaintiff, respectfully moves this court that the record on the writ of error in the above entitled case shall consist of the following:

1. Writ of error.
2. Order allowing writ of error.
3. Petition for writ of error.
4. Citation.
5. Indictment in two counts.
6. Defendants' plea in abatement, first motion to quash and demurrer.
7. Plaintiff's demurrer.
8. Decision of Hon. Edwin S. Thomas on 6 and 7.
9. Defendants' second motion to quash and dismiss indictment.
10. Transcript of proceedings including statement of Hon. Edwin S. Thomas with regard to motion to dismiss.
11. Defendants' withdrawal of motion to dismiss.
12. Plaintiff's motion in opposition to granting defendants' leave to withdraw.
13. Memorandum of Hon. Edwin S. Thomas on objections filed by the Government to defendants' withdrawal of motion to quash and dismiss the indictment.

192 14. Transcript of record including statement of Hon. Edwin S. Thomas dismissing the indictment as defective and directing verdict of not guilty by the jury.

15. Certificate of reasons for finding indictment defective and directing verdict of not guilty by the jury.
16. Bill of exceptions.
17. Assignments of error.
18. Official stenographic report of proceedings.
19. Official stenographic report of proceedings concerning contents of record on writ of error.
20. Motion concerning contents of record on writ of error.
21. Decision of Hon. Edwin S. Thomas on motion concerning contents of record on writ of error.

Dated at Hartford, Connecticut, this 21st day of May, A. D. 1923.

GEORGE H. COHEN,
Assistant United States Attorney.

[File endorsement omitted.]

193 In United States District Court

[Title omitted.]

Memorandum of decision respecting the writ of error

Filed Feb. 12, 1924

This matter was heard for the purpose of determining what shall constitute the record to be sent up to the Supreme Court on the writ of error allowed on June 6, 1922. This order was signed ex parte and before counsel for defendants had opportunity to present their claims respecting the granting of the petition.

At the outset the defendants raise objection to the allowance of the writ, because of the provisions of the criminal appeals act of March 2, 1907, chapter 2564, vol. 3, U. S. Compiled Statutes, sec. 1704. The statute provides that a writ of error may be taken by the United States from the district court direct to the Supreme Court in all criminal cases in certain instances, which, as provided for in the statute, are as follows:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statuute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy.

194 "The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

"Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

The record shows that there was no judgment quashing, setting aside, or sustaining a demurrer to the indictment, or any count thereof, where such decision or judgment was based upon the invalidity or construction of the statute upon which the indictment was founded which would properly bring this writ of error within the provisions of the criminal appeals act of March 2, 1907; nor was there any decision arresting a judgment of conviction, nor any sustaining a special plea in bar.

On the other hand, the record shows that there was a verdict of not guilty, which fact impels the conclusion that under the provisions of section 1704 of the Compiled Statutes, quoted supra, the writ of error ought not to be allowed. But it is strenuously contended by the district attorney that the writ should be allowed on the ground that the verdict of the jury, as directed by the court, was based upon the construction of the statute, thus bringing his

contention within the ruling of the Supreme Court in U. S. v. Keitel, 211 U. S. 370, 397; U. S. v. Stevenson, 215 U. S. 190, 195; and U. S. v. Carter, 231 U. S. 492.

But the transcript of what the court said to the jury does not support the contention or conclusion of the district attorney, as the record shows that in its instructions to the jury the court said, inter alia:

195 "But in view of all the facts and the law submitted to the court, and the court concluding, as it does, that the indictment is invalid because no offense is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty."

Thus it appears that the verdict was directed because of the invalidity of the indictment and not because of the construction of the statute.

The record in this case, in so far as it affects the question here presented, is as follows:

1. The indictment.
2. The court's instructions to the jury.
3. The verdict.
4. The judgment on the verdict.

It is very apparent, then, that it is only such part of the statute that reads "from a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded," that might possibly be construed to include such a case as the one at bar.

We certainly have no decision arresting a judgment of conviction, and we certainly have no decision sustaining a special plea in abatement. It seems to me that it is just as clear and just as certain that we have no decision or judgment quashing, setting aside, or sustaining any demurrer to any indictment or any count thereof, and that in view of the holding by the court, as appears from the instructions to the jury, that the indictment was invalid because no offense was properly charged, the writ of error ought not to be allowed.

196 In United States v. Keitel, supra, the Supreme Court, in construing the criminal appeals act of 1907, expressly holds that the instances wherein the Government may be allowed a writ of error are confined to those specifically enumerated in the statute. Mr. Justice White, delivering the opinion of the court, on page 397 said:

"The right of the United States to come directly to this court because of the construction of the statutes of the court below, as we have previously said in considering the question of jurisdiction, is solely derived from the act of 1907. * * * That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vesting this court with jurisdiction

only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of the decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to reexamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

In United States v. Stevenson, 215 U. S. 190, Mr. Justice Day, on page 195, said:

" The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense."

197 And on page 196, the learned justice, after quoting from the Keitel case, said:

"As the question of general law involved in the decision of the court below is not within either of the classes named in the statute, giving a right to review in this court, we must decline to consider it upon this writ of error."

In the Stevenson case the District Court of Massachusetts, on a demurrer to the indictment, held the second count thereof to be invalid for certain reasons: Had there been no demurrer the Supreme Court would not have reviewed the matter in the first place, but in view of the fact that there was a demurrer and not a verdict of a jury, as here, it went into the second question raised by the writ of error, viz, whether or not the judgment on the demurrer was based upon the invalidity or construction of the statute upon which the indictment was founded.

The cases above quoted seem clearly to sustain the contention of the defendants with reference to the objections to the allowance of the writ of error, and the decision in the Stevenson case, supra, brings us to a still further objection raised by the defendants which in substance is that if the writ of error is allowed the question which the Government desires the Supreme Court to review can not be reviewed by that court. The Stevenson case holds that the Supreme Court can not review the trial court's action involving the construction or validity of the indictment. In that case the court held that the sufficiency of an indictment upon general principles of criminal law is not open to review in the Supreme Court on a writ of error under the criminal appeals act. United States v. Winslow, 227 U. S. 202, is authority for the proposition that the ruling of the District Court respecting the construction or interpretation of an indict-

ment must be accepted in the Supreme Court when it is
198 sought to have it reviewed in the Supreme Court and that that court has no jurisdiction to review the interpretation of the indictment by the lower court.

In United States v. Carter, 231 U. S. 492, the Supreme Court held that under the criminal appeals act of March 2, 1907, it has no power to revise the mere interpretation of an indictment by the court below, but is confined to ascertaining whether that court erroneously construed the statute on which the indictment rested. On page 493, Chief Justice White said:

"On demurrer the court quashed 45 of the counts because they were 'bad in law.' It is settled that under the criminal appeals act we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute: United States v. Keitel, 211 U. S. 370; U. S. v. Stevenson, 215 U. S. 190, 196. Our power to review the action of the court then in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the court as to the mere insufficiency of the indictment."

See also to the same effect United States v. Colgate & Co., 250 U. S. 300.

The real grounds for directing the verdict in the instant case were as stated by the Court in its instructions to the jury and were predicated upon the proposition that the indictment was invalid because no offense was properly charged in it, and that no valid conviction could be had thereunder.

It follows, therefore, that the ex parte order allowing the writ of error, dated June 6, 1922, is vacated and the petition for the writ must be denied.

So ordered.

February 11, 1924.

[Indorsement omitted.]

199 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed April 24, 1924

To the Clerk:

You are requested to take a transcript of record to be filed in the United States Supreme Court, pursuant to a writ of error allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Writ of error.
2. Order allowing writ of error.
3. Petition for writ of error.

4. Citation.
5. Indictment in two counts.
6. Defendants' plea in abatement, and motion to quash and demurrer, and withdrawal of demurrer by Joseph Weissman.
7. Plaintiff's demurrer.
8. Decision of Hon. Edwin S. Thomas endorsed on 6 and 7.
9. Defendants' second motion to quash and dismiss indictment.
10. Transcript of proceedings, including statement of Hon. Edwin S. Thomas with regard to motion to dismiss.
11. Defendants' withdrawal of motion to dismiss.
12. Plaintiff's motion in opposition to granting defendants' leave to withdraw.

200 13. Memorandum of Hon. Edwin S. Thomas on objections filed by the Government to defendants' withdrawal of motion to quash and dismiss the indictment.

14. Certificate of reasons for finding indictment defective and directing verdict of not guilty by the jury.
15. Assignments of error.
16. Bill of exceptions.
17. Præcipe designating parts of record to be included in transcript of writ of error.
18. Motion concerning contents of record on writ of error.
19. Decision of Hon. Edwin S. Thomas on motion concerning contents of record of writ of error.
20. Clerk's certificate.

Dated at Hartford, Connecticut, this 23d day of April, A. D. 1924.

ALLAN K. SMITH,
United States Attorney,
GEORGE H. COHEN,
Ass't. U. S. Attorney,
Attorneys for Plaintiff in Error.

[File endorsement omitted.]

United States District Court, District of Connecticut. United States of America, plaintiff in error, vs. Joseph Weissman et al., defendants in error. Præcipe designating parts of record to be included in transcript of writ of error.

201 In United States District Court

Clerk's certificate

I, Charles Elliott Pickett, clerk of the District Court of the United States for the District of Connecticut, do certify that the annexed papers are true copies of—

Indictment.

Defendants' plea in abatement and motion to quash and dismiss the indictment.

Demurrer.

Demurrer to plea in abatement and motion to quash and dismiss the indictment.

Withdrawal of demurrer.
Defendants' motion to quash and dismiss the indictment.
Withdrawal of motion to quash and dismiss the indictment heretofore filed by said defendants.
Motion of plaintiff in opposition to defendants' motion to withdraw motion to quash and to dismiss the indictment heretofore filed by the said defendants.
Opinion.
Certificate of reasons for finding indictment defective and directing a verdict of not guilty by a jury.
Bill of exceptions.
Petition for writ of error.
Writ of error.
Assignment of errors.
Citation.
Clerk's certificate.
Testimony.
Motion concerning contents of record on writ of error.
Memorandum of decision respecting the writ of error.
Præcipe designating parts of record to be included in transcript of writ of error.

In the matter of United States vs. Joseph Weissman et al., No. 1173 Cr., on file in said court.

In testimony whereof I have set hereto my name officially and the seal of said court at New Haven, in said district, this 30th day of April, A. D. 1924.
[SEAL.] C. E. PICKETT, *Clerk.*

202 In United States District Court

Stipulation and addition to record on writ of error

Filed August 15, 1924

It is hereby agreed and stipulated by and between Benjamin Slade, Esq., in behalf of some of the defendants herein, that he represents George H. Cohen, Esq., assistant United States attorney for the District of Connecticut, for the Government, that the record in connection with the writ of error originally granted to the plaintiff herein include the certified copy of an order vacating said writ of error filed by Honorable Edwin S. Thomas in the United States District Court in the District of Connecticut on July 3, 1924, and also a certified copy of judgment for the defendants entered by said judge and filed in said court on June 3, 1924.

BENJAMIN SLADE.

GEORGE H. COHEN,
Asst. U. S. Atty.

A true copy.
Attest:
[SEAL.] C. E. PICKETT, *Clerk.*

203 At a stated term of the United States District Court, held in and for the District of Connecticut, at the Federal courthouse in the city of New Haven, State of Connecticut, on the 3d day of June, 1924.

Present: Hon. Edwin S. Thomas, District Judge.

UNITED STATES OF AMERICA, PLAINTIFF

vs

JOSEPH WEISSMAN ET AL., DEFENDANTS

Order on ex-parte application for writ of error

An ex-parte application having been made by the plaintiff on the 6th day of June, 1922, for the allowance of a writ of error to the plaintiff, and the granting of a petition therefor presented by the plaintiff, on said day the court allowed said petition and granted said writ of error without a hearing or notice to the defendants in respect to the granting of said petition or allowing said writ of error.

On February 11, 1924, the defendants objected to the granting of said petition or allowing said writ of error to the plaintiff because of the provisions of the criminal appeal act of March 2, 1907.

Now, after reading and filing plaintiff's petition for the writ of error, and proposed writ of error, and fully hearing the United States district attorney in support of allowing said petition and said writ of error, and after hearing David E. Fitzgerald, Esquire,
204 Benjamin Slade, Esquire, Charles J. Martin, Esquire, Frank Bergin, Esquire, Arthur B. O'Keefe, Esquire, attorneys for the defendants, all in opposition thereto, and after reading the ex-parte order of this court of June 6, 1922,

Now, upon motion of the defendants' attorneys, it is

Ordered, That the plaintiff's petition for the allowance of the writ of error be, and is hereby, denied; and it is further

Ordered, That the ex-parte order of this court, passed on June 6th, 1922, allowing plaintiff's writ of error be, and is hereby, vacated; and it is further

Ordered, That the order of this court of June 6, 1922, granting plaintiff's petition for writ of error be, and is hereby, vacated and said petition is denied; and it is further

Ordered, That this order be entered nunc pro tunc as of the 11th day of February, 1924.

Enter.

EDWIN S. THOMAS, *U. S. D. J.*

[SEAL.] C. E. PICKETT, *Clerk.*

205 At a stated term of the United States District Court, held in and for the District of Connecticut, at the Federal Court House in the city of New Haven, State of Connecticut, on the 3d day of June, 1922.

Present: Hon. Edwin S. Thomas, district judge.

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOSEPH WEISSMAN ET AL., DEFENDANTS

Verdict and judgment

This day comes United States of America, by George Cohen, Esq., assistant district attorney for the District of Connecticut, and come the defendants, Joseph Weissman, Morris Naletsky, Aaron B. Weissman, Jacob Anchelowitz, Louis Wolf, Morris Rencoff, Moses Perlow, Morris L. Estoff, Eli Cohen, Morris Taber, Sam Falk, Louis Kaplan, Philip Martin, Nathan Witkin, Louis Herzberg, Israel Levinson, Barney Wilson, and Louis Turner, in their proper persons, and by David E. Fitzgerald, Esq.; Benjamin Slade, Esq.; Frank S. Bergin, Esq.; Charles J. Martin, Esq.; and Arthur B. O'Keefe, Esq., their attorneys, and comes the jury heretofore empanelled and sworn, to wit, J. Edward Hungerford, Albert K. Pope, George A. Fairchild, Walter B. Hatch, R. J. Hungerford, Edward L. Clayton, Bartholomew Higgins, Irving P. Augur, Joe Tilford, Virgil M. Cooke, John C. Booth, Clifford B. Wallace.

The court instructed the jury, among other matters, as follows:

"But in view of all the facts and the law submitted to the
206 court, and the court concluding as it does that the indictment is invalid because no offence is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty."

The jury, after receiving the charge of the court, retired, and afterwards returned to court the following verdict, to wit:

"We, the jury, find all the defendants not guilty as charged in the indictment."

Whereupon the jury is discharged from further consideration of the case, and the defendants are all discharged and the bail given by the defendants is vacated.

C. E. PICKETT, *Clerk.*

A true copy.
Attest:
[SEAL.] C. E. PICKETT, *Clerk.*

[File endorsement omitted.]

[File endorsement omitted.]

207 [File endorsement omitted.]

(Endorsed on cover:) File No. 30342. Connecticut, D. C. U. S. Term No. 391. The United States of America, plaintiff in error, *vs.* Joseph Weissman, Jacob Anschelowitz, Maurice L. Estoff, et al. Filed May 15th, 1924. File No. 30342.

○

In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES OF AMERICA, PLAINTIFF IN error,
v.
JOSEPH WEISSMAN ET AL.

No. 391

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT

ON MOTION TO DISMISS

BRIEF FOR THE UNITED STATES IN OPPOSITION

HISTORY OF THE CASE

On March 3, 1920, the defendants, Joseph Weissman et al., were indicted by the grand jury for concealing assets in bankruptcy and for conspiracy to violate the bankruptcy law. The following are the outstanding facts since that time:

March 29, 1920. Defendants' demurrer, plea in abatement, and motion to quash and dismiss, filed.

November 27, 1920. Government filed demurrer to defendants' plea in abatement and motion to quash.

November 29, 1920. Defendant Joseph Weissman withdrew his demurrer.

September 9, 1921. Demurrer to plea in abatement and motion to quash sustained. Demurrer to indictment overruled.

March 2, 1922. Jury impaneled and sworn, and pleas of not guilty entered. Defendants offered a motion on "a jurisdictional question." Jurors excused until Monday (March 6th). Counsel for defendants then proceeded to argue at length on the legal sufficiency of the indictment.

March 3, 1922. Counsel for defendants concluded argument. Assistant United States Attorney objected to consideration of motion to quash and dismiss, and presented argument for Government. Case adjourned to Monday, March 13th.

March 13, 1922. Court adjourned case without day, in order to certify the disputed questions to this Court for determination.

March 31, 1922. Defendants withdrew motion to quash and dismiss.

April 3, 1922. Government filed brief in opposition to defendants' motion to withdraw motion to quash and dismiss.

April 26, 1922. Court filed decision sustaining defendants' right to withdraw motion to quash and dismiss. Case set for May 8, 1922.

May 8, 1922. Without hearing opening statements or evidence the court directed the jury to return a verdict of "not guilty." Verdict returned accordingly.

May 25, 1922. Court's certificate of reasons filed.

June 6, 1922. Bill of exceptions filed, and writ of error allowed, issued, filed, and entered.

February 11, 1924. The court filed an order vacating the order of June 6, 1922, allowing the plaintiff's writ of error. (The delay after June 6, 1922, was due to waiting for the Court to settle what should constitute the transcript of the record.)

Believing the District Court's action of February 11, 1924, to have been wholly beyond its jurisdiction, the Government has proceeded upon its writ of error granted June 6, 1922, and brought the record to this Court.

ARGUMENT

I

The "verdict" returned by the jury on May 8, 1922, in the Court below was a nullity

A verdict is—

The formal and unanimous decision or finding of a jury impaneled and sworn for the trial of a cause, upon the matters or questions duly submitted to them upon the trial. *Black's Law Dictionary.*

It is well settled that if the court finds that the evidence presented to the jury is not sufficient to justify a verdict in favor of the plaintiff, a verdict for the defendant may be directed by the court.

If, in the evidence taken, there is an entire absence of evidence on a given material issue of fact, the court may direct a verdict accordingly as to that issue. *Sparf* v. *United States*, 156 U. S. 51, 99.

If, after the taking of evidence, there appears no question of fact for the jury to determine, but only a question of law, it is proper for the court to direct a verdict. *Ferguson* v. *Arthur*, 117 U. S. 482, 490.

If, in making the opening statement or in the trial of a case, counsel makes statements or admissions which must necessarily put an end to the action, the court may direct a verdict. *Oscanyan* v. *Arms Company*, 103 U. S. 261, 263; *Liverpool, etc., Company* v. *Commissioners*, 113 U. S. 33, 37; *United States* v. *Dietrich*, 126 Fed. 656.

On the other hand, a verdict can not be sustained when directed by the court on evidence known to the court but not submitted to the jury. *Barney* v. *Schneider*, 9 Wall. 248, 251. In that case the jury was called and sworn, and was directed by the court to find a verdict for the plaintiffs, which was done. That direction was based upon the conclusions of the court from hearing the testimony taken on a former trial. It was not read before the jury in the second case, the court deeming it unnecessary to be heard by that jury.

It has also been held that a verdict may be directed for the defendant where the indictment is not sufficient to support a conviction, provided the defect is one which would be fatal on motion in arrest of judgment. *Stearns* v. *United States*, 152 Fed. 900, 905. (Motion for directed verdict denied.) The Government contends that no such defect exists in the indictment in the instant case, or any defect unless it be one of form only.

Apparently the court, in considering the second count, quite overlooked the indictment therein of Joseph Weissman for concealing property, and considered only the aiders and abettors. See the court's certificate of reasons, quoted under the next heading herein. It is not even suggested that the second count is defective as to Weissman.

In the case at bar, no evidence whatever had been taken, and there had been no opening statement by counsel and no previous trial.

It is respectfully submitted that the verdict is a nullity.

II

The order of the lower court directing a verdict of not guilty was the equivalent of a decision or judgment quashing, setting aside, or sustaining a demurrer to the indictment, or of a decision arresting a judgment of conviction for insufficiency of the indictment

In directing a verdict of not guilty the District Court stated that "The indictment is invalid because no offense is properly charged." The court's certificate of May 24, 1922, assigning reasons for that action, reads as follows:

> CERTIFICATE OF REASONS FOR FINDING INDICTMENT DEFECTIVE AND DIRECTING A VERDICT OF NOT GUILTY BY A JURY
>
> Upon application of George H. Cohen, Esq., Assistant United States Attorney for the District of Connecticut, praying this Court that it set out the reasons causing it to declare the indictment in this case defective

and directing the jury to return a verdict of not guilty thereon, this Court hereby certifies it was caused to take this action on the several counts for the following reasons:

First count

The Court construed section 37 of the Criminal Code in connection with 29B of the Bankruptcy Act as not covering a conspiracy to have a bankrupt conceal his assets from his trustee in bankruptcy where the conspiracy was formed and all overt acts in pursuance of it were done prior to the adjudication of the bankruptcy.

Second count

The Court construed section 332 of the Criminal Code as not covering an aiding and abetting of a bankrupt to conceal his assets from his trustee, where all the acts of aiding and abetting were done before bankruptcy, and also because there can be no offense of aiding and abetting a person, who, like a bankrupt, can alone commit the principal offense.

This question must be determined not by form but by substance. *United States* v. *Barber*, 219 U. S. 72, 78; *United States* v. *Oppenheimer*, 242 U. S. 85; *United States* v. *Thompson*, 251 U. S. 407, 412. The fact that the ruling of the lower court took a particular form is negligible. The existence of the jurisdiction of this court must be tested by the substantial operation of the judgment. *United States* v. *Thompson, supra.*

The Criminal Appeals Act (34 Stat. 1246) provides for the allowance of writs of error to the United States under any one of three conditions, the first two of which are as follows:

> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

The basic fact to be found under each of these paragraphs is that the decision or judgment construes the statute upon which the indictment is founded. In the first paragraph the writ is taken from a judgment sustaining a demurrer; in the second, from a decision sustaining a motion in arrest. In the usual order, the first generally occurs before the beginning of the trial; the second, at the end of the trial. The instant case may be likened to the case provided for in either paragraph but is perhaps more closely allied to the case in the second paragraph.

III

Alternatively, the decision in this case may be classed as a decision or judgment sustaining a special plea in bar

The third classification provided for in the Criminal Appeals Act consists of cases in which there have

been decisions or judgments sustaining special pleas in bar when the defendants have not been put in jeopardy. It is usually held that the defendant is in jeopardy when he has entered his plea and the jury has been impaneled and sworn. If, however, the indictment under which he is tried is so radically defective that it would not support a judgment of conviction, and that a judgment thereon would be arrested on motion, the defendant has not been put in jeopardy. *Shoener* v. *Pennsylvania*, 207 U. S. 188, 195. In the instant case the lower court has held the indictment fatally defective. If that be true, the defendant has not been in jeopardy, and this Court is not for that reason without authority to review the decision of the lower court.

IV

The lower court was without jurisdiction to make its order of February 11, 1924, vacating its order of June 6, 1922, which allowed the writ of error

This argument is based upon two facts: (1) The term at which the order of June 6, 1922, was made had long since lapsed; (2) the allowance of the writ of error had taken the cause out of the jurisdiction of the District Court.

The suing out of the writ of error, and filing thereof in the Court to which it was addressed, ousted the jurisdiction of the latter Court, and the District Court had no authority to vacate its order after the writ had been issued and filed. Certainly it could not do so at a subsequent term.

The only way in which the writ of error can be disposed of is by the action of this Court, whose jurisdiction attached when the writ of error was sued out and filed.

> After the allowance of the writ of error, the cause had passed beyond the jurisdiction of that court. *Heitmuller* v. *Stokes*, 256 U. S. 359, 361.
>
> See also *Slaughterhouse cases*, 10 Wall. 273, 291.

As to the seeming emphasis laid by the defendants in error on the fact that the writ of error was allowed without defendants having opportunity to be heard, see the following:

> It is objected to the writ of error that it was not allowed by any judge; but this is not required. It is enough that it was issued and served by copy lodged with the clerk of the court to which it was directed. *Davidson* v. *Lanier*, 4 Wall. 447, 453.
>
> The writ issues in a proper case as a matter of right, but, when sued out, security must be given, and a citation to the adverse party signed. This security may be taken and the citation signed by a judge of the Circuit Court, or any justice of this court. No action of the Circuit Court as a court is required. *Ex parte Virginia Commissioners*, 112 U. S. 177.

PENDENCY OF ANOTHER INDICTMENT

On pages 4 to 7 of the brief of defendants in error appears an affidavit by their attorney, which on page 6 invites the attention of this court to the fact that

the United States Attorney for the District of Connecticut has procured another and different indictment against the said defendants based upon the same subject-matter as is stated in the indictment in the instant case. Affiant there expresses the belief that the later indictment remedies most, if not all, of the claimed legal defects in the present indictment which were urged for the court's consideration. The Government invites the attention of the court to the fact that a jury has been impaneled and sworn and an alleged verdict rendered in the instant case, and it seems highly probable that if the Government should proceed upon such other indictment it would be met at the threshold of the case with a plea of former jeopardy.

If the Government should proceed in the lower court on the second indictment and a plea of former jeopardy were made and sustained, it would have no right to a writ of error under the Criminal Appeals Act, as from a judgment sustaining a special plea in bar.

RIGHT OF GOVERNMENT TO A REVIEW

The attention of the court is invited to the manner in which this case has been conducted throughout. Defendants' motion to quash, demurrer, and plea in abatement were filed March 29, 1920. The demurrer to the indictment was overruled September 9, 1921. On March 2, 1922, after the jury was impaneled and pleas of not guilty entered, the court permitted a motion to quash and to dismiss the indictment to

be filed, which motion was withdrawn on March 31, 1922. Thereafter, on May 8, 1922, apparently without any motion to dismiss pending before the court, and without hearing evidence, the court voluntarily expressed an opinion as to the insufficiency of the indictment and directed the jury to return a verdict of not guilty. On May 25th the court stated his reasons therefor, based on his construction of the statutes on which the indictment was founded. On June 6th a writ of error was allowed, which, however, the court attempted to vacate by its order of February 11, 1924.

Nothing could more effectually deprive the Government of any right it might have to further action in this case. If the proceedings must be taken at their face, the right of this Court to review the action of the lower court is defeated; and the Government, while it does not admit that the defendants have been in jeopardy, must very probably meet the plea of former acquittal in any proceedings in the lower court on the second indictment. It is material to the Government in the administration of the criminal laws to know whether the Criminal Appeals Act can be defeated by courts in this way.

> It is not to be assumed that trial courts will not seek rightfully to discharge their duty. But, even if it were possible to indulge in such an assumption, to do so would disregard the *power which exists as an incident to the exercise of appellate jurisdiction to compel, in a case which requires it, such action as will*

prevent a destruction of or render practically unavailing the reviewing power. [Italics ours.] *United States* v. *Carter*, 231 U. S. 492, 494.

The Government prays the exercise of that power in the instant case.

CONCLUSION

The motion to dismiss should be denied.

JAMES M. BECK,
Solicitor General.

O

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, PLAINTIFF IN ERROR
v.
JOSEPH WEISSMAN ET AL. } No. 391

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

ARGUMENT

I

This court has jurisdiction of the writ of error allowed in the case at bar

The case is before this court on writ of error sued out under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246. A motion to dismiss this writ was filed on behalf of defendants earlier in this Term, to which a brief in opposition was filed on behalf of the United States. Hearing on the motion has been postponed to the hearing on the merits. In view of the aforesaid brief of the Government, which fully recites the facts (pp. 1–3) to which we refer to avoid repetition, it is unnecessary now to do more than make brief reference to the jurisdictional point. The point

arose in the following manner: After the petit jury had been empanelled, and without any motion pending seeking the quashing or dismissal of the indictment, and without the presentation of any evidence on the merits, the trial judge addressed the jury as follows (R. pp. 84 and 85):

> Gentlemen of the jury, when you were here before to consider this case upon the motion of the defendants that the court dismiss the indictments, counsel for the defendants and the Government presented arguments covering the questions then raised. These arguments were both lengthy and searching as to the law and facts, in so far as they were set forth in the indictment. Much time was spent in the research of the law applicable to the legal questions raised by the motion. The court considered the claims made on both sides and decided that the questions involved, in view of the conflict of authority, should be presented to the highest tribunal in our judicial system for its determination, the Supreme Court of the United States, but after consideration of this whole subject I decided that such procedure was not in accordance with the rules of practice, and therefore concluded that the course suggested by me could not be followed.
>
> Subsequently the defendants withdrew the motion to dismiss.
>
> This leaves the case ready for trial, just as it was before the arguments referred to were made, but in view of all the facts and the law submitted to the court and the court con-

cluding, as it does, that the indictment is invalid, because no offense is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty, and that will dispose of the case for your purpose.

You may retire.

It is contended by defendants in error that the aforesaid action of the court does not fall within the terms of the Criminal Appeals Act, and therefore the writ of error allowed the Government under that Act must now be dismissed.

While the case is one of first impression, and may perhaps be regarded as requiring a somewhat liberal interpretation of the Criminal Appeals Act in order to bring the case within its scope, nevertheless, in view of the impending defeat of justice in this case through action of the court below which is at least out of harmony with orderly procedure, the Government believed it should not accept the judgment below as final unless this court should affirmatively declare it to be so.

For ready reference the Criminal Appeals Act, supra, is here quoted:

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any

indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

Does it not seem to be more than a mere coincidence that *after* the jury was empanelled, and the trial about to proceed, defendants should be permitted to file a "motion to quash and dismiss the indictment" on certain specified charges (R. pp. 14 and 29), that the court should take time to hear extended arguments thereon (R. pp. 30 et seq.), that thereafter the court should conclude the questions raised by the aforesaid motion were of sufficient importance to certify to this court for solution

(R. pp. 82 and 83), that shortly thereafter a "motion to withdraw motion to quash and dismiss the indictment" should be filed but never affirmatively allowed (R. p. 15), that when the Government opposed the motion to withdraw the motion to dismiss, the court should hold that the motion to withdraw was an actual withdrawal, notwithstanding the fact that the motion as framed plainly disclosed that counsel for defendants considered the consent of the court necessary (R. pp. 15, 17, and 18); that thereafter without any pending motion, and with the statement that the case now stands for trial upon the defendants' plea of not guilty (R. p. 18), the court nevertheless held the indictment invalid, and instead of entering an order quashing or dismissing it, sought to accomplish the same effect by directing the jury to return a verdict of not guilty, thus creating a situation which would not only possibly relieve the defendants from any further criminal liability, but might also make a review of its ruling by this court impossible. As further demonstrating a possible purpose to deprive the Government of its right of review, attention is called to the fact that on May 25, 1922, the court filed a certificate of its reasons for declaring the indictment defective in which it recited that in reaching its conclusion it construed certain sections of the Criminal Code and the Bankruptcy Act (R. p. 19), while on February 12, 1924, nearly two years thereafter, in determining what should constitute the record, the court undertook to hold that in its action declaring the indictment defective,

no statutory construction was involved (R. pp. 87 and 88), and therefore its previous allowance of a writ of error should be vacated (R. p. 90).

The question, therefore pressing, for consideration is whether the extraordinary procedure followed below has, as contended by the trial court and counsel for defendants, removed the case from the application of the Criminal Appeals Act, supra.

An examination of that Act discloses that a review by this court is authorized, among other things, of "a decision or judgment quashing * * * any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

It seems clear (1) that the decision of the trial court that "the indictment is invalid" (R. pp. 84 and 85), when considered from the point of view of its substance rather than mere form, is the reasonable equivalent of a decision quashing the indictment, and this result is not altered by the fact that the court thereupon directed the jury to return a verdict solely on account of such invalidity of said indictment. Stated somewhat differently, the court's decision is not less a decision quashing the indictment because the court insisted on making the jury a partner in taking that action. *United States* v. *Barber*, 219 U. S. 72, 78; *United States* v. *Oppenheimer*, 242 U. S. 85; and *United States* v. *Thompson*, 251 U. S. 407, 412. When the court decided that the indictment was invalid, such decision effec-

tively quashed the indictment, and the verdict of the jury added nothing to that result. Secondly, it seems not open to argument that the decision of the court was based upon the construction of the statutes involved, as demonstrated by the motion to dismiss and quash the indictment (R. p. 14), the argument thereon (R. p. 61), and the court's specific statement of reasons for holding the indictment invalid (R. p. 19). The long-after labored attempt by the court to show that it did not construe the statutes (R. pp. 87 et seq.) is now entitled to no serious consideration.

Of course it is to be also noted that the Criminal Appeals Act forbids review by this court in any case in which there has been a verdict in favor of the defendant. If this provision means a verdict directed by the court merely to give attempted effect to its decision holding the indictment invalid, then we concede that the Government is without a right of review in this case, and the motion to dismiss should be granted. Such a course of procedure, if upheld, however, opens the door for effective destruction of the remedies afforded the Government by the Criminal Appeals Act. Is it not the more reasonable view that the verdict specified in the statute means a verdict on some part of the merits involved in the case—e. g., a man is on trial under an indictment containing numerous counts, some of which are quashed by the court during the trial, and on the others the defendant is acquitted. Such a verdict would seem to be of the type required by the Criminal Appeals Act.

II

The indictment here involved states an offense under the applicable statutes

It was the view of the court below that where the conspiracy to have a bankrupt conceal his assets was formed and the overt acts in pursuance thereof were done prior to actual bankruptcy, no offense under Section 37 of the Criminal Code and Section 29b of the Bankruptcy Act of July 1, 1898, Chap. 541, 30 Stat. 554, was committed.

Section 37 of the Criminal Code reads as follows:

> If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years, or both.

Section 29b of the Bankruptcy Act, supra, reads as follows:

> A person shall be punished by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly and fraudulently (1) concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt or used any such claim

> in composition personally or by agent, proxy, or attorney or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

There seems to be no legal barrier or difficulty to the forming of an indictable conspiracy and committing overt acts in furtherance thereof prior to the assumption by one of the conspirators of the status in which alone the substantive crime which is the object of the conspiracy can be committed. The exact point here involved is not new. It has been decided favorably to the Government in such cases as *Greenspahn* v. *United States*, 298 Fed. 736, 738, and the cases therein cited. The Circuit Court of Appeals for the Seventh Circuit said in that case:

> While no witness testified that a bankruptcy proceeding was in actual contemplation of the alleged conspirators, this does not necessarily bar conviction for a conspiracy to violate section 29b. Conspiracy to violate this section may be shown, without any proof of appointment of a trustee, or of pendency then or thereafter of bankruptcy proceedings. *Meyer* v. *United States*, 258 Fed. 212; 169 C. C. A. 280; *Steigman* v. *United States*, 220 Fed. 63; 135 C. C. A. 631; *Radin* v. *United States*, 189 Fed. 568; 111 C. C. A. 6; *United States* v. *Cohn* (C. C.), 142 Fed. 983.

In the Radin case cited in the foregoing excerpt this court refused a certiorari, 220 U. S. 623, case No. 1049.

For further elaboration of this point see argument below on motion to dismiss set forth in the record at pages 61 et seq.

The foregoing relates to count one of the indictment.

III

Count two of the indictment charging aiding and abetting is valid

The court's objection to the second count of the indictment appears to be twofold, (1) that all acts of aiding and abetting were committed prior to bankruptcy, and (2) there can be no aiding and abetting because the bankrupt alone can commit the offense.

This count of the indictment is based upon Section 332 of the Criminal Code which reads as follows:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

The second count here under consideration clearly charges Joseph Weissman with violating Section 29b of the Bankruptcy Act, and as to him is not open to the court's objection.

As to the aiders and abettors it is difficult to understand upon what legal theory the court concluded that they must commit some act after bankruptcy. If the intent and natural result of the acts committed

was to bring about an actual ultimate violation of the statute, the time when such acts were committed can be of no legal consequence. Certainly, if those who conspire and commit overt acts prior to bankruptcy can not escape liability as pointed out in the cases hereinbefore cited, and apparently approved in *United States* v. *Rabinovich*, 238 U. S. 78, 84, it would be difficult to find a legal basis for holding that if the substantive offense is actually committed, the conspirators did not through their conspiracy and overt acts "cause, procure, aid, and abet" the commission of such substantive offense. The principle of law which upholds the conspiracy charge here involved necessarily and for the same reasons requires that the aiding and abetting count be now held valid.

IV

It is respectfully submitted that the judgment below should be reversed.

JAMES M. BECK,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

NOVEMBER, 1924.

O

391
(1924)
No. 1032.

Supreme Court of the United States

UNITED STATES OF AMERICA—PLAINTIFF IN ERROR,

against

JOSEPH WEISSMAN, ET ALS.

In Error to the District Court of the United States for the District of Connecticut.

Defendants in Error Motion to Dismiss and Brief in Support of Said Motion.

Benjamin Slade

Attorney for (Some) Defendants in Error,
152 Temple Street,
New Haven, Conn.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,
against
JOSEPH WEISSMAN, ET AL.
Defendant-in-Error.

MOTION OF JOSEPH WEISSMAN, MORRIS NALETSKY, AARON B. WEISSMAN, JACOB ANCHELOWITZ, LOUIS WOLF, AND MORRIS RENCOFF TO DISMISS THE ALLEGED WRIT OF ERROR.

And now come the alleged defendants-in-error aforesaid, and move the Court to dismiss the alleged writ of error herein, for the following reasons:

1. On February 11, 1924, the District Court of the United States for the District of Connecticut, wherein the above entitled cause originated, denied the plaintiff-in-error's petition for a writ of error, and on said date, vacated an order passed on the 6th day of June, 1922, granting plaintiff-in-error's petition for a writ of error, and allowing the same.

2. Because of the order of the District Court of the United States for the District of Connecticut, passed on February 11, 1924, the plaintiff-in-error has no standing before this Court, and there are no proceedings either in error or appeal.

3. Because there was a verdict of "not guilty" in favor of the defendants-in-error rendered by the jury in the District Court of the United States for the District of Connecticut in the above entitled cause.

4. Because no writ of error can be taken or allowed the United States in any case where there has

been a verdict in favor of the defendants-in-error, as in the instant case, as is by statute in such case made and provided.

5. Because the record discloses that the District Court of the United States for the District of Connecticut concluded and ruled that the indictment is invalid because no offense is properly charged, and therefore no valid conviction can be had under it, and no writ of error lies from such ruling and determination of the Court, by virtue of the statute in such case made and provided.

6. Because it appears from the record that no decision or judgment quashing or setting aside or sustaining a demurrer to the indictment or any count thereof was made, or that such decision or judgment was based upon the invalidity or construction of a statute upon which the indictment is founded.

7. Because it appears from the record that no decision arresting a judgment of conviction for insufficiency of the indictment based on the invalidity or construction of a statute upon which the indictment was founded, was made by the Court.

8. Because it appears from the record that no decision or judgment was made by the Court below sustaining a special plea in bar when the defendants-in-error have not been put in jeopardy.

9. Because it appears from the record, and particularly from the opinion of the District Court of the United States for the District of Connecticut, rendered February 11, 1924, that the verdict in the instant case was directed upon the proposition that the indictment was invalid, and no offense was properly charged in it, and no valid conviction could be had thereunder.

9. Because this Court, upon the facts appearing in the record, has no jurisdiction on this proceeding to re-

view the rulings of the District Court of the United States for the District of Connecticut under the provisions of the Criminal Appeal Act of March 2, 1907.

10. Because the plaintiff-in-error seeks a review by this Court of a decision of the lower Court concerning subjects not embraced within the clauses of the Criminal Appeal Act of March 2, 1907.

11. Because under the Criminal Appeal Act of March 2, 1907, this Court is given the special right to review in favor of the United States questions limited by the very terms of the statute and none others, and the record in the instant case does not present any question falling within the limitations prescribed by said Criminal Appeal Act.

12. Because it appears from the record that the Judgment of the Court below did not involve questions of statutory construction of a character reviewable under the Criminal Appeal Act of March 2, 1907.

Copies of this motion, together with notice of date of presentation, have been served upon opposing counsel.

WHEREFORE, the above described defendants-in-error pray that the present proceedings be dismissed.

Dated at New Haven, this 31st day of May, 1924.

Benjamin Slade

Attorney for the Above Named
Defendants-in-Error.

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Plaintiff-in-Error,
against
JOSEPH WEISSMAN, ET AL.
Defendants-in-Error.

Benjamin Slade, of New Haven, being duly sworn, deposes and says:

I am now, and for about thirty years last past have been a practicing attorney, and have been the attorney of record for several of the alleged defendants-in-error in the above entitled cause since the same was instituted, and have personally been active as attorney in behalf of such defendants in all of the proceedings in said cause, and am familiar with all of said proceedings.

On May 8, 1922, the United States District Court for the District of Connecticut directed the jury which was empanelled to try the above entitled cause, to bring in a verdict of not guilty, and the Court, as a part of its instructions to the jury, stated as follows:

> "But in view of all the facts and the law submitted to the Court, and the Court concluding as it does that the indictment is invalid because no offence is properly charged, and that therefore no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty."

In pursuance to the directions of the Court, the jury did, on May 8, 1922, render a general verdict of not guilty.

On June 6, 1922, the United States of America, acting by the office of the District Attorney for the District

of Connecticut, filed certain papers with said United States District Court of Connecticut, in alleged proceedings for a writ of error to this Court, and your affiant and other attorneys representing other defendants in said cause, and the District Attorney's office for the District of Connecticut thereafter appeared before the said United States District Court for the District of Connecticut for the purpose of considering what shall constitute the record on the Government's effort to take a writ of error in this case, and at said hearing, counsel for the defendants in said cause claimed that the United States of America, under the Criminal Appeal Act, upon the facts in this case, could not take, nor could the District Court of the United States for the District of Connecticut allow the United States of America to take or sue out a writ of error to the United States Supreme Court.

On February 11, 1924, the District Court of the United States for the District of Connecticut sustained the contentions of the defendants-in-error in respect to the subject aforesaid, and directed the entry of an order vacating the ex-parte order granted the United States on June 6, 1922, allowing said writ of error, and denying the United States its petition for such writ of error, as more fully appears by a copy of the Court's opinion, hereto annexed and made a part hereof.

Neither your affiant nor (so far as your affiant is informed) any of the other attorneys representing some of the defendants in the above entitled cause have received any notice of any character or description, either from the District Attorney's office of the District of Connecticut, or the Attorney General of the United States, or the Solicitor General of the United States, on February 11, 1924, or thereafter, with respect to any contemplated

proceedings by the United States with reference to said alleged writ of error.

The first notice your affiant had with respect to any effort on the part of the plaintiff-in-error to pursue the alleged proceedings on the writ of error was a letter received from the Solicitor-General of the United States, dated May 16, 1924, copy of which is hereto annexed and made a part hereof.

Your affiant, as the attorney for some of the alleged defendants-in-error aforesaid, has never had presented to him any proposed record in this proceeding since February 11, 1924, and up to the date hereof; nor has he seen since said date any proposed record in these proceedings compiled, prepared or submitted to the Clerk of the United States District Court for the District of Connecticut.

Your affiant is informed and believes that the United States of America, acting through the United States District Attorney for the District of Connecticut, subsequent to the date of the finding of the indictment by the Grand Jury in the above entitled cause, procured another and different indictment against the said defendants, based upon the same subject matter as is stated in the indictment in the instant case, and that said later indictment is still pending in the District Court of the United States for the District of Connecticut; and said later indictment your affiant believes, remedied most of, if not all of the claimed legal defects in the present indictment, which were urged for the Court's consideration in the instant case.

Your affiant carefully examined the provisions of the Criminal Appeal Act of March 2, 1907, and is of the opinion that this Court, upon the record in the instant case, has no jurisdiction in the premises.

Your affiant is therefore of the opinion that these proceedings should be dismissed.

Benjamin Slack

Subscribed and sworn to
before me, this 31st day
of May, 1924.

Samuel H Platner

Notary Public.

Copy.

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C.

May 16, 1924.

Benjamin S. Slade, Esq.
200 Broadway
New York, N. Y.

Sir:

I beg to advise you that on May 26, 1924, I will submit to the Supreme Court of the United States a motion to advance the case of United States, Plaintiff in Error, vs. Joseph Weissman et al, for hearing at as early a date during the October 1924 term as will suit the convenience of the Court.

Copies of the motion will be forwarded to you as soon as they are received from the printer.

Very truly yours,

James M. Beck,

Solicitor General.

H

UNITED STATES OF AMERICA,
Plaintiff-in-Error,

against

JOSEPH WEISSMAN, ET AL.
Defendants-in-Error.

Sirs:

Please take notice that Joseph Weissman, Morris Naletsky, Aaron B. Weissman, Jacob Anchelowitz, Louis Wolf and Morris Rencoff, who are some of the alleged defendants-in-error in the above entitled cause, will move before the Supreme Court of the United States, in the court room at the City of Washington, in the District of Columbia, on 6th day of October 1924, upon the opening of court on that day, or as soon thereafter as counsel can be heard, to dismiss the proceedings upon the grounds more fully set forth in said motion to dismiss, which is hereto annexed and made a part hereof; and for such other and further relief as to the Court may seem just and proper in the premises.

Dated at New Haven, this 29th day of August, 1924.

Benjamin Slade

Attorney for the Above Named
Defendants-in-Error.

To Hon. Allan K. Smith,
United States District Attorney for the District of Conn.
Hon. James M. Beck, Solicitor General
of the United States

UNITED STATES OF AMERICA,
STATE OF CONNECTICUT,
NEW HAVEN, COUNTY.

ss. New Haven, May 22, 1924.

I, Theresa V. Brennan, being duly sworn, depose and say:

That I am secretary to Benjamin Slade, attorney at law, with offices at 152 Temple Street, New Haven, Connecticut, and that I then and there mailed, by depositing in the post office at New Haven, postage prepaid, an envelope addressed to Hon. James M. Beck, Solicitor General of the United States, care of the office of the Attorney General of the United States at Washingon, D. C., containing a true duplicate of the within and foregoing motion to dismiss, copy of affidavit and notice of motion.

THERESA V. BRENNAN.

Subscribed and sworn to
this 22nd day of May,
1924, before me.

BENJAMIN SLADE,
Notary Public.

UNITED STATES OF AMERICA,
Plaintiff-in-Error,
against
JOSEPH WEISSMAN, ET ALS.,
Defendants-in-Error.

Brief of Some of the Defendants-in-Error on Motion to Dismiss.

Statement.

The defendants-in-error were indicted for an alleged conspiracy to violate section 37 of the Criminal Code and section 29A of the Bankruptcy Act. After a jury was empaneled and sworn the defendants raised the question of the legal sufficiency of the indictment and the Court sustained such claim and directed, on May 8th, 1922, a verdict of not guilty.

The Court in directing the verdict stated to the jury, among other matters, as follows: "But in view of all the facts and the law submitted to the Court, and the Court concluding as it does that the *indictment is invalid because no offense is properly charged,* and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty." (Italics ours.)

On June 6th, 1922, the plaintiff-in-error presented to the trial Court a petition for a writ of error and the Court made an ex-parte order granting the same.

Shortly before February 11th, 1924, the plaintiff-in-error gave notice to defendants-in-error that an application would be made to the trial Court for the purpose of determining what should be included in the record on

the proposed proceedings in error. At such hearing defendants-in-error objected to the allowance of the writ because the same could not be taken or allowed under the Criminal Appeal Act of March 2nd, 1907.

On February 11th, 1924, the United States District Court for the District of Connecticut, by an order then made, vacated its ex-parte order of June 6, 1922, allowing the writ of error and denied plaintiff-in-error's petition for such writ of error.

Since the Court's ruling on February 11, 1924, was made the plaintiff-in-error started the present activities.

POINT I.

Under the Criminal Appeal Act of March 2, 1907, 34 Stat. at L., chap. 2564, this Court had no jurisdiction to review the questions determined by the Court below.

The trial Court ruled that the indictment is legally insufficient and invalid because no offense is properly charged and no valid conviction can be had under it.

See Judge Thomas' Memorandum of Decision of February 11, 1924. This ruling on the authorities of this Court is not reviewable by the Supreme Court of the United States.

U. S. vs. Keitel, 211 U. S., 370;
U. S. vs. Stevanson, 215 U. S., 190;
U. S. vs. Carter, 231 U. S., 492.

In *U. S. vs. Carter, supra,* this Court sustained a motion to dismiss the writ of error for want of jurisdiction, adding that under the Criminal Appeal Act of March 2nd, 1907, it had no power to review a ruling of

the District Court, that the indictment "was bad in law".

The Court, speaking by Chief Justice White, at page 492 says:

> "It is settled that under the Criminal Appeal Act we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the Court in a case under review erroneously construed the statute. * * * Our power to review the action of the Court then in this case can alone rest upon the theory that what was done amounts to a construction of the Statute. But it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment."

Justice Day in *U. S. vs. Stevanson, supra,* in discussing this subject says at page 190:

> "The object of the criminal appeal statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this Court should be of the opinion that the statute, properly construed, did in fact embrace an indictable offense. * * * As the question of general law involved in the decision of the Court below is not within either of the classes named in the statute giving a right of review in this Court, we must decline to consider it upon this writ of error."

In *U. S. vs. Keitel,* 211 U. S., 492, this Court in discussing the subject says:

> "The right of the United States to come directly to this Court because of the construction of the statutes of the Court below, as we have previously said in considering the question of jurisdiction, is solely derived from the Act of 1907. * * * That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this Court by direct writ of error in the cases for which it provides contemplates vesting in this Court with jurisdiction only to review the particular question decided by the Court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower Court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

The record in the case at bar discloses that this case does not fall within any of the limitations prescribed by the Criminal Appeal Act of March 2nd, 1907.

POINT II.

The verdict of "Not Guilty" in favor of the defendants deprives this Court of Jurisdiction to consider and determine the questions raised by plaintiff in error.

The Criminal Appeal Act of March 2nd, 1907, provides as follows:

> "Provided, *That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.*" (34 State, 1246—Italics ours.)

In the instant case there was a verdict in favor of the defendants-in-error, and under the foregoing statute, the plaintiff-in-error cannot successfully ask to have this Court review and determine the correctness of the trial Court's action. Whether the trial Court was correct or wrong in directing the jury to return a general verdict of not guilty is not reviewable under the Criminal Appeal Act in question.

It should be noted that no "decision or judgment" was made by the trial Court "quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."

On the contrary the trial Court ruled that the indictment under the general law is either bad in law or legally insufficient. This conclusion is evident from that portion of the trial Courts' charge to the jury as follows:

> "But in view of all the facts and the law submitted in the Court, and the Court concluding, as it does, *that the indictment is invalid* because no

offense is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty." (Italics ours.)

To remove any doubt as to what the trial Court had in mind when the verdict was directed, attention is respectfully called to the following language found in the trial Court's opinion and memorandum of decision of February 11th, 1924:

> "Thus it appears that the *verdict was directed because of the invalidity of the indictment and not because of the construction of the statute.*" (Italics ours.)

If the trial Court was mistaken in its conclusions that the indictment was legally insufficient, that ruling must stand and under the authorities as we read them, the conclusion cannot be reviewed.

U. S. vs. Stevenson (*supra*);
U. S. vs. Winslow, 227 U. S., 202;
U. S. vs. Yuginovich, 256 U. S., 450.

In *U. S. vs. Colgate & Co.*, 250 U. S., 300, it is held that the Federal District Court's interpretation of the indictment must be accepted by the Federal Supreme Court on a direct writ of error sued out under the Act of March 2nd, 1907.

POINT III.

There is no lawful record before this Court.

The record here shows that on June 6th, 1922, the trial Court, by an ex-parte order, granted the plaintiff-in-error's petition for a writ and allowed said writ.

On February 11th, 1924, the trial Court after discovering its mistake in allowing the writ and petition,

vacated its orders of June 6th, 1922. Under the Criminal Appeal Act the trial Court is expressly forbidden to allow a writ of error to the United States "in any case where there has been a verdict in favor of the defendant".

We assume that the plaintiff-in-error may urge that the trial Court, in directing a defendant's general verdict, was wrong. We feel it to be a sufficient answer to suggest that under the Act of March 2nd, 1907, this Court cannot review that question.

The Act in question makes no distinction between what might be termed a rightful verdict and an erroneous verdict. The language of the Act is:

> "* * * in any case where there has been a verdict in favor of the defendant."

On February 11th, 1924, when the trial Court discovered its erroneous action evidenced by the orders it passed on June 6th, 1922, allowing the writ of error, had the right to correct its erroneous action by passing the later orders of February 11th, 1924, vacating those made on June 6th, 1922.

If plaintiff-in-error believes that irrespective of the trial Court's conclusion a writ of error does lie in this case it seems to us that some proper process before this Court would test that question.

Instead of taking some such course the plaintiff-in-error's position now must be that though the trial Court disallowed the writ, yet the plaintiff-in-error can bring up what it terms a record that has no legal foundation to support it; namely, no writ of error at all was allowed and none exists.

POINT IV.

We herewith submit the trial Courts opinion in support of this motion to dismiss:

Copy.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, vs. JOSEPH WEISSMANN, ET ALS.	No. 1173 D. C.

MEMORANDUM OF DECISION RESPECTING THE WRIT OF ERROR

This matter was heard for the purpose of determining what shall constitute the record to be sent up to the Supreme Court on the writ of error allowed on June 6, 1922. This order was signed ex-parte and before counsel for defendant had opportunity to present their claims respecting the granting of the petition.

At the outset the defendants raise objection to the allowance of the writ, because of the provisions of the Criminal Appeals Act of March 2, 1907, Chapter 2564, Vol. 3, U. S. Compiled Statutes, Sect. 1704. The statute provides that a writ of error may be taken by the United States from the District Court direct to the Supreme Court in all criminal cases in certain instances, which, as provided for in the statute, are as follows:

> "From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any account thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where

such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance. Provided, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

The record shows that there was no judgment quashing, setting aside or sustaining a demurrer to, the indictment, or any count thereof, where such decision or judgment was based upon the invalidity or construction of the statute upon which the indictment was founded which would properly bring this writ of error within the provisions of the Criminal Appeals Act of March 2, 1907; nor was there any decision arresting a judgment of conviction—nor any sustaining a special plea in bar.

On the other hand, the record shows that there was a verdict of not guilty which fact impels the conclusion that under the provisions of Section 1704 of the Compiled Statutes, quoted supra, the writ of error ought not to be allowed. But it is strenuously contended by the District Attorney that the writ should be allowed on the ground that the verdict of the jury, as directed by the

Court, was based upon the construction of the statute, thus bringing his contention within the ruling of the Supreme Court in *U. S. vs. Keitel,* 211 U. S., 370, 397; *U. S. vs. Stevenson,* 215 U. S., 190, 195; and *U. S. vs. Carter,* 231 U. S., 492.

But the transcript of what the Court said to the jury does not support the contention or conclusion of the District Attorney as the record shows that, in its instructions to the jury, the Court said, *inter alia,*—

> "But in view of all the facts and the law submitted to the Court, and the Court concluding, as it does, that the indictment is invalid because no offense is properly charged, and that, therefore, no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty."

Thus it appears that the verdict was directed because of the invalidity of the indictment and not because of the construction of the statute.

The record in this case, in so far as it affects the question here presented, is as follows:

1. The Indictment.
2. The Court's Instructions to the Jury.
3. The Verdict.
4. The Judgment on the Verdict.

It is very apparent then that it is only such part of the statute that reads—"from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded", that might possibly be construed to include such a case as the one at bar.

We certainly have no decision arresting a judgment of conviction, and we certainly have no decision sustain-

ing a special plea in abatement. It seems to me that it is just as clear and just as certain that we have no decision or judgment quashing, setting aside or sustaining any demurrer to any indictment or any count thereof, and that in view of the holding by the Court, as appears from the instructions to the jury, that the indictment was invalid because no offence was properly charged, the writ of error ought not to be allowed.

In *United States vs. Keitel, supra*, the Supreme Court, in construing the Criminal Appeals Act of 1907, expresely holds that the instances wherein the Government may be allowed a writ of error, are confined to those specifically enumerated in the statute. Mr. Justice White delivering the opinion of the Court, on page 397, said:

> "The right of the United States to come directly to this Court because of the construction of the statutes of the Court below, as we have previously said in considering the question of jurisdiction, is solely derived from the act of 1907. * * * That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this Court by direct writ of error in the cases for which it provides contemplates vesting this Court with jurisdiction only to review the particular question decided by the Court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very

terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

In *United States vs. Stevenson*, 215 U. S., 190, Mr. Justice Day, on page 195, said:—

> "The object of the criminal appeals statute was to permit the United States to have a review of questions of statutory construction in cases where indictments had been quashed, or set aside, or demurrers thereto sustained, with a view to prosecuting offenses under such acts when this Court should be of opinion that the statute, properly construed, did in fact embrace an indictable offense."

And on page 196, the learned Justice, after quoting from the Keitel lease, said:—

> "As the question of general law involved in the decision of the Court below is not within either of the classes named in the statute, giving a right of review in this court, we must decline to consider it upon this writ of error."

In the Stevenson case the District Court of Massachusetts, on a demurrer to the indictment, held the second count thereof to be invalid for certain reasons. Had there been no demurrer the Supreme Court would not have reviewed the matter in the first place, but in view of the fact that there was a demurrer and not a verdict of a jury, as here, it went into the second question raised by the writ of error, viz:—whether or not the judgment on the demurrer was based upon the in-

validity or construction of the statute upon which the indictment was founded?

The cases above quoted seem clearly to sustain the contention of the defendants with reference to the objections to the allowance of the writ of error, and the decision in the Stevenson case, *supra*, brings us to a still further objection raised by the defendants which in substance is that if the writ of error is allowed the question which the Government desires the Supreme Court to review cannot be reviewed by that Court. The Stevenson case holds that the Supreme Court cannot review the trial Court's action involving the construction or validity of the indictment. In that case the Court held that the sufficiency of an indictment upon general principles of criminal law is not open to review in the Supreme Court on a writ of error under the Criminal Appeals Act. *United States vs. Winslow*, 227 U. S., 202, is authority for the proposition that the ruling of the District Court respecting the construction or interpretation of an indictment must be accepted in the Supreme Court when it is sought to have it reviewed in the Supreme Court and that that Court had no jurisdiction to review the interpretation of the indictment by the lower Court.

In *United States vs. Carter*, 231 U. S., 492, the Supreme Court held that under the Criminal Appeals Act of March 2, 1907, it has no power to revise the mere interpretation of an indictment by the Court below, but it is confined to ascertaining whether that Court erroneously construed the statute on which the indictment rested. On page 493, Chief Justice White said:—

> "On demurrer the Court quashed 43 of the counts because they were 'bad in law'. It is settled that under the Criminal Appeals Act we have no

authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the Court in a case under review erroneously construed the statute: *United States vs. Keitel,* 211 U. S., 370; *U. S. vs. Stevenson,* 215 U. S., 190, 195. Our power to review the action of the Court then in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the Court as to the mere insufficiency of the indictment."

See also to the same effect *United States vs. Colgate & Co.,* 250 U. S., 300.

The real grounds for directing the verdict in the instant case were as stated by the Court in its instructions to the jury and were predicated upon the proposition that the indictment was invalid because no offence was properly charged in it, and that no valid conviction could be had thereunder.

It follows, therefore, that the ex-parte order allowing the writ of error, dated June 6, 1922, is vacated and the petition for the writ must be denied.

SO ORDERED.

February 11, 1924.

This motion to dismiss ought to be sustained.

Respectfully submitted,

Benjamin Ma

Attorney for Some of the Defendants-in-Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES OF AMERICA, PLAINTIFF-IN-ERROR
vs.
JOSEPH WEISSMAN, ET AL., DEFENDANTS-IN-ERROR } 391

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT

BRIEF OF JOSEPH WEISSMAN, MORRIS NALETSKY, AARON B. WEISSMAN, JACOB ANCHELOWITZ, LOUIS WOLF AND MORRIS RENCOFF.

Some of the Named Defendants in Error.

POINT I

ON MOTION TO DISMISS.

These defendants, earlier in this term, filed in this Court, a Motion to Dismiss the writ of error, which remains undetermined, and which, we understand, will be considered in connection with the main argument of the case.

In obedience to the rule of this Court, the motion to dismiss is accompanied by a brief in support thereof, and we respectfully suggest a consideration of said brief and the authorities therein relied on.

The plaintiff-in-error, in its brief, takes the position that the Court below allowed the present alleged writ of error, but the record (R. P. 93) discloses a disallowance thereof.

We concede the Government's contention that once a writ of error is issued, the cause passes beyond the jurisdiction of the Court below.

This rule, however, as we believe, applies only to proper causes wherein a writ of error issues as a matter of right, and not to causes where a writ of error does not lie. The Government, in the instant case, evidently did not believe that it had an absolute right, under the Criminal Appeal Act of March 2, 1907, to a writ of error, for it presented a petition therefor, and prayed for its allowance. (R. P. 20-21.)

The Court, evidently believing that a writ of error must be granted as a matter of right, allowed the same (R. P. 22) in the first instance, but when it later discovered that the instant case is one in which, by the provisions of the Act of March 2, 1907, a writ of error can not be taken or allowed, as provided for in the Act, vacated its former allowance of same. (R. P. 18-24, inc.)

It can not be, if the Court erroneously granted a writ of error, that it can not revoke its order granting it, and refuse its allowance. An order vacating the original allowance of the writ of error remains in full force, and that being so, then there is no writ of error before this Court, unless this Court holds that the lower Court's order, vacating the original allownace of the writ, is inoperative, and of no force.

The plaintiff-in-error now contends that the Court's action in directing a verdict was erroneous.

It is our claim that the plaintiff-in-error cannot seek a review of the judgment of acquittal on the verdict of the jury, under the Criminal Appeal Act of March 2, 1907, even though the Court's action in directing a verdict was in fact erroneous.

U. S. vs. Sanges,
144 U. S. 310.
U. S. vs. Evans,
213 U. S. 297.

The motion to dismiss is well founded, and should be granted, as we believe.

POINT II.

THE FIRST COUNT OF THE INDICTMENT FAILS TO SET FORTH ANY OFFENSE COGNIZABLE IN THE UNITED STATES COURTS.

The first count of the indictment is founded on Sect. 37 of the Criminal Code and Sect. 29B of the Bankruptcy Act, which are fully quoted in the brief for the plaintiff-in-error.

It is our contention that an act which, when committed, is not a criminal offense under the laws of the United States, can not be made such by the happening of a subsequent event or events.

That very question was decided by this Court in the case of

U. S. vs. Fox,
95 U. S. 673.

Sect. 5132 of the Revised Statutes, in force in 1874, provided that:

> "Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor" who, within three months before the commencement "under the false color and pretence of carrying on business and dealing in the ordinary course of trade, obtains on credit, from any person, any goods or chattels, with intent to defraud" shall be punishable by imprisonment for a period not exceeding three years.

The defendant in that case was convicted, and upon a motion in arrest of judgment, the judges holding the Circuit Court were opposed in opinion, and have certified to this Court the question upon which they differed.

This question is thus stated in the certificate:

> "If a person shall engage in a transaction which, at the time of its occurrence is not a violation of any law of the United States, to wit: the obtaining of goods upon credit by false pretences and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

The Court, in speaking by Justice Field, says:

> "There is no doubt of the competency of Congress to

provide by suitable penalties for the enforcement of all legislation necessary or proper to the execution of powers with which it is entrusted. And as it is authorized 'to establish uniform laws on the subject of bankruptcies throughout the United States' it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system - - -"

"To legislate for the prevention of frauds in either of these particulars, when committed in *contemplation of bankruptcy*, would seem to be within the competency of Congress. Any act, committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offence against the United States. . .

"The act described in the ninth subdivision of Sect. 5132 of the Revised Statutes is one which concerns only the state in which it is committed; it does not concern the United States.

"It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so and we cannot supply qualifications which the Legislature has failed to express.

"Our answer to the question certified must be in the negative; and it will be so returned to the Circuit Court."

(Italics ours.)

From the above opinion, as we understand it, it is quite plain that it is there held that unless Congress prescribes an act, if done in contemplation of bankruptcy, shall be a crime, it is not such.

Jurisdiction of the United States Courts, under the Bankruptcy Act, attaches only, as we believe, when there is in fact a proceeding, either voluntary or involuntary. In the absence of such proceeding in bankruptcy, the Bankruptcy Act is legally inoperative and the Courts of the United States cannot have jurisdiction to punish an act committed and completed before any proceedings in bankruptcy occurred.

The plaintiff-in-error cites and relies upon the case of

Greenbaum vs. U. S.,
298 Fed. 736-738.

and the cases therein cited, in all of which it is in substance held

that a crime of conspiracy to violate Sect. 29B of the Bankruptcy Act may be successfully prosecuted by the United States, even though there be in fact no proceedings in bankruptcy.

The legal soundness of that proposition we challenge.

The case of

U. S. vs. Cohen,
142 Fed. 983

and some of the other cases cited with approval by the Court in the case of Greenbaum vs. U. S., supra, when examined, will be found to be largely supported by the assumption that the conspiracy to conceal assets, in violation of Sect. 29B of the Bankruptcy Act, continued up to and beyond the time of the proceedings in bankruptcy, and the commission of an overt act after the bankruptcy, to effectuate the purpose of the conspiracy.

After a diligent search, we were unable to find any decision of this Court upon the precise point, now contended for, other than the case of U. S. vs. Fox, supra. Of course it is well established that the Federal Courts have no jurisdiction over common law offences and punishment can be inflicted for violation of only such laws as are expressly enacted by Congress.

The Bankruptcy Act, by several of its provisions defines crimes that may be committed by bankrupts and others and provides penalties therefor, which, in some cases, differ from penalties for similar offences under the Revised Statutes of the United States. Does it not necessarily follow that if Congress intended that any act done in contemplation of bankruptcy should be punishable, it would have so provided in express terms by that Act?

In the absence of a specific act of Congress, making Sect. 37 and Sect, 332 of the Penal Code of the United States applicable to acts committed in contemplation of bankruptcy, those sections do not apply, as we believe.

By Article I, Sect. 7 of the Constitution of the United States, Congress has power "To establish a uniform rule of naturalization and *uniform laws on the subject of bankruptcy throughout the United States;*". (Italics ours.)

Under this provision, it was contemplated, as it seems to us, that a bankruptcy law, if established, will be "uniform" and will

in itself embrace everything that Congress found necessary to effectuate its purpose, including a definition of offences, classification of offenders, and the punishment for violations of its provisions.

It is only by such complete act that it can be "uniform" in practical effect.

Courts of bankruptcy, in various districts, now differ in opinion as to whether a person other than a bankrupt, can commit the crime of concealing assets under the Bankruptcy Act of 1898. A diversity of opinion also exists on other subjects arising under that Act.

If the suggestion we offer is sound that difference of opinion would not exist. Our claim, we believe, finds support in the history disclosed from the former Bankruptcy Acts of the United States.

A comparison of the Bankruptcy Acts of 1800, 1841 and 1867 with the Bankruptcy Act of 1898 will disclose that in the former acts, Congress prohibited by specific provision many acts that could be committed by third persons, as well as the bankrupt, and provided penalties therefor, but from the act of 1898, many of such provisions were omitted.

For instance, under Sect. 44 of the Bankruptcy Act of 1867, it was a misdemeanor for the bankrupt to obtain credit within three months before his bankruptcy, with intent to defraud, and such misdemeanor was punishable by a term not exceeding three years, upon conviction in any Court of the United States.

The various acts prohibited by that Section of the Act of 1867 are by specific language made to apply to acts *"after the commencement of proceedings in bankruptcy"*.. (Italics ours.)

Sect. 29 of the same Act regulates the effect of certain acts done *"in contemplation of becoming a bankrupt"*. (Italics ours.)

Sect. 35 of said Act again employs the term: *"in contemplation of insolvency or bankruptcy"*. (Italics ours.)

Sect. 7 of that Act expressly adopts the general perjury statute as a part of the act.

In Sect. 26 of the Bankruptcy Act of 1800, it was provided that:

> "If after a bankrupt shall have finished his or her final examination, any other person or persons shall voluntarily make discovery of any part of such bankrupt's estate before unknown to the Commissioner" (under the present Act known as trustee) "such person or persons shall be entitled to five per cent out of the effects so discovered, and such further reward as the Commissioner shall think proper;"

and the same section further provides:

> "And if any such trustee" (the term "trustee" as used in that Act evidently means the person who held the property which in fact belonged to the person who subsequently was adjudged a bankrupt) "having notice of the bankruptcy, wilfully conceal the estate of any bankrupt for the space of ten days after the bankrupt shall have finished his final examination, as aforesaid, shall forfeit double the value of the estate so concealed, for the benefit of creditors."

Sect. 16 of the Bankruptcy Act of 1800 prescribes penalties for persons other than the bankrupt, who shall *"fraudulently or collusively claim or detain property of the bankrupt."* (Italics ours.)

The Bankruptcy Act of 1841, in defining the effect of certain acts stated in Sect. 2 thereof, adopts the terms: *"in contemplation of bankruptcy."* (Italics ours.)

Sect. 4 of that Act, in specific terms, makes the general perjury statute a part of the Act.

Many of these provisions of the former Acts were omitted from the Bankruptcy Act of 1898, and particularly all provisions prohibiting acts done in contemplation of bankruptcy.

In those acts, when Congress intended to adopt the perjury statute as a part of the Act, it by specific terms did so.

Is it not reasonable to assume that if it was intended by Congress, at the time of the passage of the Bankruptcy Act of 1898, to make any then existing laws of the United States a part thereof, it would have done so by a specific provision in the Act?

This was actually done in former acts by adopting the perjury statutes as a part thereof.

Under the Bankruptcy Act of 1898, a person other than the bankrupt cannot be convicted for a criminal offence for concealing property belonging to the estate in bankruptcy.

Field vs. U. S. 137, Fed. 6.

There the Court says:

"Neither the offence nor the punishment herein described exists at common law. They are creatures of the act of Congress. In the absence of that act, no one could be legally punished by imprisonment, for having concealed property from his trustee in bankruptcy. In the presence of the Act, no one can be lawfully punished by imprisonment for its concealment, who is not by the terms of this statute subject to the punishment. The Act specifically designates the persons liable to the punishment which is prescribed. There are those who commit the offence denounced while they are bankrupt or after they have received their discharge in bankruptcy. Under the familiar rule, this specification by the statute of those who are bankrupts and those who have been bankrupts as the persons liable to the punishment necessarily excludes all others from that liability, and no other person can be lawfully punished under this section for the offence that is denounced. . . . Present or past bankruptcy is an essential attribute of every person who may be an offender under this statute.

"A man ought not to be punished unless he falls plainly within the class of persons specified by such statute. An act which is not clearly an offense by the express will of the legislative department of the Government must not be made so after its commission by a broad construction adopted by the judiciary.

"The definition of an offence and the classification of the offenders are legislative and not judicial functions and where, in this case at bar a penal statute is plain and unambiguous in its terms, the courts may not lawfully extend it by construction to a class of persons who are excluded from its effect by its terms, because in their opinion the acts of the latter are as mischievous as those of the class whose deeds are denounced."

In

U. S. vs. Deitrich
126 Fed. 685

the Court said:

"This is a prosecution for a criminal offence. *To be punishable, the act charged must have possessed at the time when its commission was completed, every element necessary to its criminality under the statute.* A completed act which is not an offence at the time of its commission can not become

such by any subsequent act of the party charged or of another, with which it has no connection; and this is true whether the first act was done for a good or a bad purpose." (Italics ours.)

The Court, in this case, cites with approval the case of

U. S. vs. Fox
supra.

The possible suggestion that the acts charged in the first count fall within the evils prohibited in Sect. 29B of the Bankruptcy Act would not warrant a prosecution if the acts so charged do not fall within the language of the Act.

That very question was determined in

U. S. vs. Sheldon
15 U. S. (2 Wheat.) 119-120.

That case involved the act of July 6, 1812, which provided that if any citizen of the United States, or person inhabiting the same, shall transport or attempt to transport, over land or otherwise, in any wagon, cart or sleigh, naval or military stores, arms or munitions of war, or any article of provisions from the United States to Canada, the thing by which the articles are transported, with the articles themselves, shall be forfeited and the person so transporting shall forfeit a certain sum and be guilty of a misdemeanor.

The Court decided then that in its ordinary acceptation, to convey in some one of the enumerated vehicles did not include the driving of living, fat oxen on foot, and it was not a transportation thereof, within the meaning of the statute.

See also

Kaufman vs. U. S.,
129 C. C. A.,
149 Fed. 212.
U. S. vs. Wiltberger,
5 Wheat 96.
U. S. vs. Clayton,
Fed. Cases 14814.
U. S. vs. Lake,
129 Fed. 499.

This Court, in the case of

U. S. vs. Rabinowitz,
238 U. S. 87,

in passing upon the subject now under discussion, said:

> "It is at least doubtful whether the crime of concealing property belonging to the bankrupt estate from the trustee, as defined in Sect. 29B (1) of the Bankruptcy Act can be perpetrated *by any other than a bankrupt* or one who has received a discharge as such." (Italics ours.)

The case of

U. S. vs. Grodsen,
164 Fed. 157,

is an authority for the proposition that it is not a crime, under Sect. 5440 of the Revised Statutes, and Sect. 37 of the Criminal Code, to conspire before the bankrutpcy to conceal assets and the actual removing and concealing of such assets before the bankruptcy and when the conspiracy terminated before the bankruptcy proceedings. In that case, by an indictment, the bankrupt,. and others, were charged with conspiracy to conceal property of a bankrupt from his trustee in violation of the Bankruptcy Act. The Court held that the indictment did not charge an offence under Sect. 5440 where it appeared that the conspiracy was formed and the property removed and concealed by the defendant prior to the bankruptcy.

The Court, in its opinion, says:

> "The indictment is challenged because, as it is argued, it does not allege a conspiracy to aid a bankrupt who concealed his property, but alleges a conspiracy formed before the bankruptcy, and that all three defendants should conceal. In the first count, it appears that the defendant F. C. was adjudicated a bankrupt on July 6, 1907 on an involuntary petition and his trustee was appointed July 30, 1907. In April and May, 1907, C., who was in the retail clothing business in Chicago, and became insolvent, and the defendants G. S. and G. N. knew of such insolvency. Thereupon, the three defendants arranged to have a large amount of C's stock of the value of $4164, shipped from his store to defendant G's, and they were so shipped and remained concealed until June, 1908, not being given up by G. or the other defendants to the trustee in bankruptcy. No overt act of concealment occurred after the bankruptcy. All that was done was for the defendants to fail to discover the goods or inform the trustee of their existence or place of concealment, and to fail to turn them over. . . .
>
> "It also charged by the first and third counts that if C was

adjudged a bankrupt, the defendants conspired to knowingly conceal from the trustee the aforesaid goods, and that in pursuance of the conspiracy and to effect the object thereof, the defendants concealed the property from the trustee and have at no time turned it over to him, nor has any person done so, and the defendants still continue to conceal such property.

"In other words, it is charged that defendants, after they had concealed the property, conspired to continue to conceal it, and did no act in furtherance thereof. That is, did no overt act to continue to conceal the property after the trustees had been appointed. They simply failed to act. Had they moved the property, or sold any part of it, the charge that they had conspired to conceal it might possibly be sustained, although two of them could not commit the offence of concealment. But in the absence of this, the indictment must be held to be bad and the demurrer is sustained."

It seems to us that the foregoing case is identical on the material questions in the case at bar.

The first count in the case at bar (R. P. 1-8) sets forth that the alleged conspiracy was formulated before the filing of the petition, and the last overt act was committed likewise before the filing of the petition, and thereby terminated, and no act, either of omission or commission is alleged as an overt act after the filing of the petition.

Upon this situation, the defendants in error contend that the alleged conspiracy terminated with the last overt act, and no crime is set forth in that count of which the United States Court has jurisdiction.

Further cases upon the proposition that unless the act charged is within the statute, the defendant can not be successfully prosecuted, are

U. S. vs. Sheldon,
15 U. S. (2 Wheaton) 119.

U. S. vs. Hall,
98 U. S. 358.

U. S. vs. Reinicke,
98 U. S. 447.

U. S. vs. Van Auken,
96 U. S. 336.

U. S. vs. Murphy,
3 Wall 469.

U. S. vs. Taffe,
86 Fed. Rep. 113.
U. S. vs. Payne,
22 Fed. 426.

A very instructive case on the point now under discussion is

U. S. vs. Crafton,
4 Dill. (U. S. 145).
Federal Cases No. 14,881.

There, the Court held that an indictment can not be sustained upon allegations of conspiracy to defraud when the fraud contemplated was only made a fraud upon the United States subsequent to the alleged conspiracy to commit it.

The alleged fraud in that case involved an effort to obtain from the United States Treasury the payment of a claim against the State of Missouri, the payment of which had not, at the time of the alleged conspiracy, been assumed by Congress.

Applying the principle of that case, expressed by the Court in the following langunge: (Dillon, J.)

> "However fraudulent in ulterior design, or morally reprehensible the acts charged in the indictment may be, still our judgment is that Sect. 5440 of R. S. of the U. S. cannot be extended to a case when the fraud which the conspiracy contemplated can only be effected in case an act of Congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon. The demurred to indictment must be sustained."

to the instant case, the act of concealment is made a crime after the adjudication in bankruptcy, and the appointment of a trustee, and not before. The indictment must charge that the conspiracy was to do some act then made a crime by the laws of the United States, and it must state the acts intended to be carried out by the agreement of the parties, so that it can be seen that the object of the conspiracy was then a crime against the United States, and made such crime at the time the conspiracy was entered into, or when the last overt act was committed.

U. S. vs. Taffe, supra.
In re Wolf,
27 Fed. 606.
U. S. vs. Melfi,
118 Fed. 899.

In the case of

Pettibone vs. U. S.,
148 U. S. 197,

it is held that an indictment charging a conspiracy to corruptly and by threats and force to obstruct the due administration of justice in the United States Court, it must be averred and proved that the accused knew that the witness or officer was a witness or officer, in order to ...

Attention is respectfully asked to Section 29 b (4) of the Bankruptcy Act of 1898 which is as follows:

"A person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently received any material amount of property from a bankrupt after the filing of the petition with intent to defeat this Act." This provision of the Bankruptcy Act of 1898 indicates clearly that Congress did not intend to punish as criminal the receipt of property by any one before the filing of the petition in bankruptcy either by or against the person who transferred such property. If otherwise Congress would have added a provision making such acts criminal just as much for receiving before the filing of the petition as afterwards.

POINT III.

THE ASSIGNMENTS OF ALLEGED ERROR DO NOT PRESENT QUESTIONS THAT CAN BE REVIEWED BY THE FEDERAL SUPREME COURT ON A WRIT OF ERROR.

Under Subdivision 2 of Rule 21 of the Rules of the Supreme Court of the United States, it is provided as follows:

> "A specification of errors relied upon, which in cases brought up by a writ of error shall set out separately and particularly each error asserted and intended to be urged;—"

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Under the foregoing authorities, as we understand them, if there were no bankruptcy proceedings in fact pending, and a conspiracy was formed in contemplation of bankruptcy, and an overt act was committed prior thereto, and none thereafter, no conviction could be sustained. Before an Act can be punished as a crime under the Federal Laws that act must be specifically made a crime by statute.

Searles vs. U. S., 132 U. S. 570.
U. S. vs. Brewer, 139 U. S. 278.
U. S. vs. Chase, 135 U. S. 255.
Todd vs. U. S., 158 U. S. 278.
U. S. vs. Harris, 177 U. S. 305.
U. S. vs. Britton, 108 U. S. 199.
U. S. vs. Townsend, 148 U. S. 490.
U. S. vs. Comfort, 25 Fed. 904.
U. S. vs. Wilson, 58 Fed. 771.
U. S. vs. Deitrich, 126 Fed. 676.

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Under this rule, it is our understanding that in proceedings in error, under the Act of March 2, 1907, it is necessary that the assignments of error only embrace the subjects covered within the limitations prescribed by that Act, namely:

(a) That the Court, by its decision or judgment quashing, setting aside or sustaining the demurrer to any indictment or any count thereof, erred and in what way in its construction of a statute or that its ruling in such decision or judgment was based upon the invalidity of a statute.

(b) That error was committed in arresting the judgment of conviction for insufficiency of an indictment, and that the decision of the Court was based upon an erroneous construction of the statute; or of the invalidity thereof. The claimed construction should be set forth.

(c) That the Court erred in sustaining a special plea in bar when the defendant has not been put in jeopardy.

An examination of the alleged errors assigned will disclose that none of them can be said to come within the limitations set forth in said Act.

Assignments of error 2 to 8, inclusive, assign subjects, as it seems to the defendants-in-error, to be not reviewable at all.

The first assignment of error seems to embrace what is designated as the Court's certificate of reasons (R. P. 19), which was obtained by the Assistant District Attorney from the Court on May 25, 1922, evidently without notice or hearing, and the plaintiff in error now urges that the Court's action in directing the verdict was controlled by the matters as set forth in said certificate.

The record (pages 84, 85) shows that on May 8, 1922, seventeen days before the certificate of reasons was made by the Court, the Court, in its instructions to the jury said:

> "This leaves the case ready for trial, just as it was before the arguments referred to were made, but in view of all the facts and the law submitted to the Court, and the Court concluding, as it does, that the indictment is invalid, because *no offence is properly charged*, and that therefore no valid conviction can be had under it, will dispose of the case by directing you to retire and return a general verdict of not guilty, and that will dispose of the case for your purpose." (Italics ours.)

From the instructions of the Court, thus given, it seems apparent that the Court concluded that the indictment was invalid because *no offence was properly charged,* and not because of the Court's construction of any statute.

If, however, this Court should find it proper to consider the contents of the certificate of reasons (R. P. 19), then we contend that the Court's conclusions, as expressed on May 25, 1922, seventeen days after the verdict, were correct, because under Sect. 29B of the Bankruptcy Act, a conspiracy which was formed before the bankruptcy, and terminated before the bankruptcy, is not punishable under the laws of the United States without appropriate allegations to show the continuation of that conspiracy, and the doing of an overt act after the proceedings in bankruptcy were started.

Sect. 332 of the Criminal Code does not cover an aider and abettor of a bankrupt to conceal his assets from a trustee.

The Bankruptcy Act classified the offender who can conceal assets from a trustee; namely, a bankrupt, or, such who conceals after his discharge. If an individual who does not fall in that classification can commit this offence, then we contend he cannot be made a principal under Sect. 332 of the Criminal Code, in aiding and abetting a bankrupt to commit such an offence.

Field vs. U. S., supra.
U. S. vs. Waldman,
188 Fed. 524.
U. S. vs. Lake, supra.

Under the special qualifications imposed by Sect. 29B of the Bankruptcy Act, it does not admit of accessories, and hence a third person who is not the bankrupt cannot become a principal under Sect. 332 of the Criminal Code.

POINT IV.

THE SECOND COUNT OF THE INDICTMENT IS LEGALLY INSUFFICIENT.

While the second count embraces the terms "cause, procure, aid and abet" of the named defendants, to do the acts charged, the count as a whole more nearly attempts to charge a conspiracy than a concealment or an aiding and abetting.

That count fails to set forth any specifically enumerated property, or the quantity thereof. It does not set forth actual possession or control of such property by any of the defendants after the adjudication in bankruptcy. It does not set forth any facts from which the Court could say that a concealment of any property exists.

The pleader did employ the term "conceal" but that is merely a conclusion of the pleader and not a fact. It fails to state that any demand had been made by the trustee, after bankruptcy proceedings, and the alleged property claimed to be concealed.

It fails to state that anything was done by any of the defendants after the filing of the petition in bankruptcy.

The count does set forth that the act of bankruptcy consisted of purchasing merchandise on or about the first day of April, 1919 (R. P. 8), seven months before the bankruptcy, and of removing the property of said Joseph Weissman from his place of business, presumably about the time of, or shortly after its receipt but in all events long before the bankruptcy; also that the alleged concealed property belonged to Joseph Weissman; that the alleged concealment was "in manner and form aforesaid". The only act set forth in the count to which the term "aforesaid" can have reference is that of April 1, 1919, (seven months before the bankruptcy), all defendants conspired that Weissman should buy property, remove it and defraud his creditors.

If a bankrupt actually transfers property although it is done fraudulently, to keep it from his creditors, still if he does not reserve any right to a re-conveyance or any beneficial interest therein, that is, unless a secret trust in favor of himself is established, then there is no concealment from the mere fact that the property is omitted from the schedule.

Re Denby,
122 Fed. 688.
Re Jacobs,
144 Fed. 868.

The essential elements of concealment must consist of possession or control of the property; the concealment must be by the bankrupt; it must be from the trustee, and it must properly belong to the estate in bankruptcy.

In

U. S. vs. Phillips,
196 Fed. 574,

it is held that property is concealed or secreted when it is withheld by means of physical concealment, from the lawful officer who is looking for it.

The offence denounced by Sect. 29B contemplates the concealment of property by some act or acts on the part of the bankrupt, than merely omitting it from the schedule.

Re Hemdley,
Vol. 31 A. B. R., 231.

There is no allegation in the count laying the venue where the property was located at the time of the alleged concealment. The venue of concealment is the place where the property is located at the time of its concealment, and is an indispensable allegation.

Greist vs. U. S.,
231 Fed. 157.

Unless the act charged is within the language of the statute it is not an offence though the act be within the spirit of the statute.

U. S. vs. Sheldon,
15 U. S. (2 Wheat) 119, 120

The defendants-in-error in the Court below, challenged the legal sufficiency of the indictment, and each count thereof. (See argument of counsel, R. P. 30-60, inc., 79-82, inc.)

POINT V.

THE JUDGMENT ENTERED IN THE COURT BELOW IS CONCLUSIVE ON WHAT WAS DECIDED.

The plaintiff-in-error, in its brief, contends that because of the contents of what is called "certificate of reasons" (R. P. 19), this Court should hold that the decision of the Court below involved the construction or validity of a statute.

We have already pointed out that the record discloses (R. P. 84, 85) that the Court's action in directing a verdict was controlled solely by its determination, as expressed in its charge to the jury, "that the indictment is invalid because no offence is properly charged."

The judgment entered in the case (R. P. 94) recites the foregoing instructions given by the Court to the jury, and said judgment, as entered, should govern this Court, as it seems to us, in determining what was done in the Court below.

In the case of

U. S. vs. Barber,
219 U. S. 78,

this Court, in discussing what governs it in determining the action of the Court below, says:

> " . . . since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and the Court in that judgment expressly placed its decision that the United States could not prosecute the defendant upon the plea of the bar of limitation."

Under this authority, it seems to us that the judgment actually entered is conclusive on the question as to what was decided.

From that judgment it appears that the Court's decision in the instant case involved the invalidity of the indictments and not the construction of a statute.

The jurisdiction of the Federal Supreme Court is limited by the Criminal Appeal Act of March 2, 1907, to the consideration only of the decision of the courts below construing a statute, and cannot be used for the purpose of correcting other errors.

We respectfully refer to the cases cited in the brief of the defendants-in-error, on the motion to dismiss.

POINT VI.

THE COURT DIRECTED THE VERDICT AFTER IT HEARD THE CLAIMS MADE BY BOTH SIDES AS TO THE SUFFIENCY OF THE INDICTMENT.

The plaintiff-in-error, in its brief, intimates that the Court's action was without any motion pending, which is an inaccurate statement.

Record pages 29 and 30 disclose htat defendants-in-error, before argument, moved to dismiss the indictment, and it was claimed

that the motion involved a question of jurisdiction. (See R. P. 29-60, inc.)

The defendants-in-error do not believe it would be of any assistance to this Court to devote any portion of this brief in reply to some of the unkind criticisms made by plaintiff-in-error against the Court below.

CONCLUSION.

The motion of the defendants-in-error to dismiss the appeal should be granted for want of jurisdiction, and the writ of error be dismissed and the judgment affirmed.

Respectfully submitted,

SLADE, SLADE & SLADE,
Attorneys for Some of the
Defendants-in-Error.

BENJAMIN SLADE,
Of Counsel.

UNITED STATES *v.* WEISSMAN ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

No. 391. Argued December 5, 1924.—Decided December 15, 1924.

The proviso of the Criminal Appeals Act "That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant," applies to a verdict directed by the court before opening statement or introduction of evidence upon the ground that the indictment failed to charge an offense. P. 378.

Writ of error dismissed.

ERROR to the District Court under the Criminal Appeals Act.

Mr. Assistant Attorney General Donovan, with whom *Mr. Solicitor General Beck* and *Mr. Harry S. Ridgely* were on the brief, for the United States.

Mr. Benjamin Slade, for defendants in error, submitted.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a writ of error taken by the United States under the Criminal Appeals Act of March 2, 1907, c. 2564; 34 Stat. 1246. The indictment is for a conspiracy to conceal assets in contemplation of the bankruptcy of Joseph Weissman, alleged to have continued up to and including

the day when a petition in bankruptcy was filed. There is also a count for concealing and causing to be concealed assets after the adjudication and the appointment of trustees. It is unnecessary to follow the vicissitudes and oscillations of the case before the time that the defendants in error were finally before a jury for trial. At that time the Court, after reciting to the jury some of the previous steps, stated that as it had concluded that the indictment was invalid because no offence was properly charged and therefore no valid conviction could be had, it would dispose of the case by directing a general verdict of not guilty. A verdict of not guilty was rendered, subject to exceptions, on which the Government seeks to come here.

Apart from other objections and without going further, the Government is met by the proviso in the Criminal Appeals Act: "That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." It is argued that the verdict is a nullity because nothing had been submitted to the jury, no evidence, not even an opening statement, and that the judgment should be treated as in substance sustaining a demurrer to the indictment or quashing it. It is hard to see what good this would do the Government, as even then, unless we go behind the judgment and what was said at the trial, and possibly in any event, the direction would seem to have been based on a construction of the indictment and not upon a construction of the statutes of the United States.

But we are of opinion that no such narrowing construction can be put upon the Criminal Appeals Act for the purpose of enlarging the Government's right of review. The words taken literally refer simply to the matter of fact that there "has been a verdict"—not qualified by any consideration of whether it was right or wrong. In like manner a writ of error from a judgment sustaining a special plea in bar is given only "when the defendant has

not been put in jeopardy." Furthermore if directing the verdict was wrong it certainly was not beyond the jurisdiction of the Court. The jury were there and the prisoners before them, and so far as jurisdiction is concerned it did not matter whether evidence had been put in or not. We stop at the point of jurisdiction, the want of which would be the only pretext that could be offered for going behind the literal meaning of the statute. But we do not mean to imply that an opening by counsel or the offer of evidence is necessary in order to justify directing a verdict of not guilty; there are other cases in which it is done.

It is suggested that the course adopted in this case offers to the lower court a means of escaping the review allowed by the act; and there is an innuendo that there was a desire of that sort below. But such considerations do not affect the construction of the act, and it is fair to say that while the judge should not have directed a verdict when he did so, and if he thought the indictment bad should have quashed it before the jury came in, and left the question in form to be taken up, still we see no sufficient reason for supposing that the direction was given with any notion of escaping the jurisdiction of this Court.

Writ dismissed for want of jurisdiction.